

**MILITARY LAW  
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**HEADQUARTERS, DEPARTMENT OF THE ARMY  
OCTOBER 1967**

## PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

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PAMPHLET

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# THE CANONS, THE CODE, AND COUNSEL: THE ETHICS OF ADVOCATES BEFORE COURTS-MARTIAL\*

By Lieutenant Colonel Robert J. Chadwick\*\*

*The author begins by discussing the ABA Canons of Professional Ethics and the American College of Trial Lawyers Code of Trial Conduct, as they apply to the military officer-lawyer. Having concluded that the Canons and Trial Code do apply to military officer-lawyers, he turns to a detailed analysis of various areas which give rise to ethical problems. In each of these areas, he discusses the rules set forth in the UCMJ, Manual, Canons, and Trial Code, as well as the judicial decisions.*

## I. INTRODUCTION

The battle is the payoff. Ralph Ingersoll.

[O]ur battles still are won by justice. William Moody, *An Ode in Time of Hesitation*.

A court-martial is a battle-combat in the military arena.<sup>1</sup> Tactics are the means by which one seeks to defeat an adversary once the battle is joined, be it small unit tactics in the sodden, steamy jungles of South Vietnam or trial tactics before that long, green table in the battle-scarred halls of military justice.

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\* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Fifteenth Advanced Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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'See Latimer, *A Comparative Analysis of Federal and Military Criminal Practice*, 29 TEMP. L. Q. 1, 15 (1966).

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All too often, however, the objectives gained by battle are proclaimed to justify the means employed—whether fair or foul. Despite the no-holds-barred protestations of those who would thus espouse this Machiavellian concept of subordinating morals to expediency, the ends do not justify the means. It is not unimportant what a trial lawyer does so long as he wins his case. Surely, for the prosecution, the ultimate aim is justice rendered and not conviction at any cost. Similarly, for the defense counsel, partisan advocate though he may be, acquittal by any means should not be his goal. As we have rules of land warfare to govern combat in the field, so must we have and observe ground rules of forensic engagement. The trial attorney must face and resolve the apparent dilemma between the tactics needed to ensure victory and the related need for justice every day of his professional career in the courtroom.<sup>2</sup>

Every attorney's trial tactics differ in many respects with reference to those of other lawyers, as does his sense of justice. But the field of honor on which advocates join battle as champions of their clients is circumscribed by well-delineated sidelines beyond which the combatants may not pass. The goal is secured by effectively using the entire available latitude of the field while staying in bounds. The ground rules which govern the advocate's permissible latitude of trial tactics constitute a practical, down-to-earth, bread-and-butter subject. Rehearings of reversed court-martial cost time and money as well as professional embarrassment.

The most recent, most interesting, and undoubtedly one of the future leading cases on the conduct of counsel was rendered during 1966 by the Court of Military Appeals in *United States v. Lewis*.<sup>3</sup> That case contains and condemns a virtual catalog of unethical practices of both trial and defense counsel, including: (1) both counsel testifying without withdrawing from the case, in contravention of Canon 19; (2) counsel referring to defendant's attempted negotiation of a pretrial agreement; (3) trial counsel mentioning misconduct of the accused not charged; (4) acrimonious exchanges between counsel in an effort to blacken each other's reputation, coupled with such epithets as "two bit piece of cat-meat" who "came out here with a crawling Army negotiation

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<sup>2</sup>See *Lyne, Trial Tactics and Justice*, in AMERICAN LAW STUDENT ASSOCIATION, *LAWYER'S PROBLEMS OF CONSCIENCE* 48-49 (1953).

<sup>3</sup>16 U.S.C.M.A.145, 36 C.M.R. 301 (1966).

deal” and “damn liar”; and (5) defense counsel and trial counsel becoming more concerned with hammering at each other than in giving the accused a fair trial.

The accused, in a classic understatement, made the subsequent observation that counsel in their zeal to attack each other somehow overlooked him. The Court of Military Appeals severely criticized both counsel, who were senior attorneys, holding that their activities, coupled with the failure of ‘the law officer to control them, denied the accused a fair trial and required a reversal of the conviction.

To fulfill his mission and adequately represent his client, every advocate’s sights must be focused on the source and content of the ethical considerations which govern his trial tactics.

### A. THE LAWYER’S PROFESSIONAL ETHICS

#### 1. *Purposes of Professional Ethics.*

Ethics form a small portion of the complex system of discipline which civilized society has imposed upon itself through laws, customs, moral standards, and even social etiquette—rules of many kinds, enforced in many ways. A code of professional ethics constitutes a profession’s voluntary assumption of self-discipline, supplementing but not supplanting the rules of conduct observed by the general public. Such a code of ethics is a practical working tool as necessary to the professional practitioner as his theoretical principles and technical procedures.<sup>4</sup>

A profession is characterized by highly complex activities which necessitate an extensive training period for its practitioners to acquire the needed skill and knowledge to enable them to render specialized service to a client. The complexity of the specialized service makes it impossible in many instances for the client to judge adequately the caliber of the services rendered until it is too late to take corrective action. In view of the general public’s inability to judge the quality of these services, and since the professional practice provides the means of livelihood for the practitioner, a potentially deep conflict of interest exists. In effect, the adoption and self-regulation of a code of ethics is the profession’s way of informing its members of the standards of

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<sup>4</sup>CAREY & DOHERTY, *ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION* 3-4 (1966)

conduct required from them and of notifying the public that the profession will protect the public's interest.

Professional legal ethics are basic principles of right action for attorneys at law. Such ethics do not involve solely moral questions, but also include behavior designed for practical, as well as idealistic, purposes. "Ideals are standards conceived as perfect but not yet attained and perhaps even unattainable. Ideals are goals but they are not enforceable by rules."<sup>5</sup>

A code of professional ethics may be designed in part to encourage ideal behavior, but basically such a code is intended to be enforceable. It must set requirements at a higher level than the rules of conduct observed by the general public, but to be a practical working tool, its requirements must be at a level lower than the ideal. To utilize a concept established by Carey and Doherty,<sup>6</sup> professional legal ethics may be regarded as a mixture of moral and practical concepts, with a sprinkling of exhortation to ideal conduct designed to evoke right action on the part of the members of the legal profession—all reduced to rules which are intended to be enforceable, to some extent at least, by disciplinary action.<sup>7</sup>

### 2. *Origin of the Canons of Professional Ethics.*

Where do the ethical rules for attorneys originate? Throughout the civilian community in the United States, they have come from the American Bar Association, from state societies of attorneys, and from those state jurisdictions where such rules have been promulgated under authority of law. While not identical, the rules of these various organizations are similar. The basic principles are the same, although the form, arrangement, and extent of coverage may differ. The ethical principles of the American Bar Association—denominated the Canons of Professional Ethics—govern the professional conduct of the largest number of attorneys,<sup>8</sup> and these Canons are the most widely

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<sup>5</sup>*Id.* at 6.

<sup>6</sup>*Id.*

<sup>7</sup>See Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 136 (1966), criticizing the American Bar Association Canons of Professional Ethics for their mixture of the horatory and the prohibitory—setting forth highest professional aspirations in some parts and only minimum standards in others.

<sup>8</sup>The ABA has 123,000 members. See 12 AMERICAN BAR NEWS, No. 1, p. 10 (15 Jan. 1967).

known outside the profession. They have been adopted in whole or in part by many of the state bar associations.<sup>9</sup>

There are six sources of authority that define the military officer-lawyer's ethical obligations : (1) the *Uniform Code of Military Justice*;<sup>10</sup> (2) the *Manual for Courts-Martial, United States, 1951*;<sup>11</sup> (3) appellate opinions of the United States Court of Military Appeals and case decisions of the boards of review of the respective service Judge Advocates General ; (4) the Canons of Professional Ethics of the American Bar Association;<sup>12</sup> (5) the Code of Trial Conduct of the American College of Trial Lawyer~; and (6) the usages, customs, and practices of the court-martial bar.

### 3. *Evolution of the Canons of Professional Ethics.*

The first ascertainable code of professional ethics in the United States was that formulated and adopted by the Alabama State Bar Association in 1887.<sup>14</sup> Many of the states thereafter adopted similar codes.<sup>15</sup> In 1905, the president of the American Bar Association appointed a committee of distinguished attorneys to report on the advisability and practicability of the adoption of a code of ethics by the American Bar Association. After that committee reported that the adoption of such a code was both advisable and practicable, it was instructed to prepare a draft thereof. The committee's draft was presented to the 1908 meeting of the American Bar Association in Seattle, Washington, and the 32 recommended Canons of Professional Ethics of the American Bar Association were adopted on 27 August.<sup>16</sup> In 1928 Canons 33 to 45 were adopted, and Canons 46 and 47 were adopted in 1933 and 1937, respectively."

Although individual Canons have been amended throughout the years, they have remained essentially in their original form. It

<sup>9</sup> H. DRINKER, *LEGAL ETHICS* 26 (1953) [hereafter cited as DRINKER].

<sup>10</sup> Hereafter called the Code and cited as UCMJ art. \_\_\_\_.

<sup>11</sup> Hereafter called the Manual and cited as MCM, 1951, ¶ \_\_\_\_.

<sup>12</sup> Hereafter called the Canons.

<sup>13</sup> Hereafter called the Trial Code.

<sup>14</sup> DRINKER 23. As noted therein, the Alabama Code of Ethics was based largely on Judge Sharswood's *Professional Ethics*, reprinted as 32 A.B.A. REP. (1907), and Hoffman's *Fifty Resolutions*, reproduced in DRINKER at app. E.

<sup>15</sup> DRINKER 23-24.

<sup>16</sup> *Id.* at 24; A. ROBBINS, *A TREATISE ON AMERICAN ADVOCACY* 247 (2d ed. 1913).

<sup>17</sup> DRINKER 25-26.



had been recognized for some time that the Canons as a whole needed to be brought up to date in the light of the vast changes in the practice of law and in the public responsibilities of lawyers since the beginning of the 20th century.<sup>18</sup> Accordingly, in 1964, the House of Delegates of the American Bar Association created a Special Committee on Evaluation of Ethical Standards to study the adequacy and effectiveness of the Canons.<sup>19</sup> In February 1965, the Special Committee—which was composed of twelve lawyers, judges, and law professors—officially reported that the existing Canons were in need of substantial revision.<sup>20</sup> The American Bar Foundation then created a research project to work in collaboration with and in support of the Special Committee to prepare proposed changes to the Canons.<sup>21</sup> Tentatively, the recommendations of the Special Committee (popularly known as the Wright Committee) are scheduled for release in the fall of 1967. Overall plans call for submission of a final draft to the House of Delegates at its midyear meeting in 1968.<sup>22</sup> It is not the intent of the Committee, however, to rewrite de novo the ethical standards of the legal profession. The broad principles of most of the Canons have proved to be remarkably sound and enduring.<sup>23</sup> However, ethical concepts are not fixed, final, or precise. They reflect the sense of responsibility and experience of the legal profession which it had developed up to a given point in time,<sup>24</sup> and revision at this point in history is deemed most timely.

#### 4. *Code of Trial Conduct of the American College of Trial Lawyers.*

The American Bar Association promulgated its Canons of Professional Ethics for the legal profession as a whole. The American College of Trial Lawyers, because of its particular concern for the improvement of litigation proceedings and the trial conduct of counsel, adopted its Code of Trial Conduct in August 1956 in Dallas, Texas.<sup>25</sup> The Trial Code does not supplant

<sup>18</sup> Powell, *The President's Page*, 50 A.B.A.J. 1005 (1964).

<sup>19</sup> *Id.*

<sup>20</sup> Cheatham, *A Re-Evaluation of the Canons of Professional Ethics—Introduction*, 33 TENN. L. REV. 129, 130 (1966).

<sup>21</sup> *Id.*

<sup>22</sup> 12 American Bar News, No. 1, p. 18 (15 Jan. 1967); 11 American Bar News, No. 9, p. 3 (15 Sept. 1966).

<sup>23</sup> Powell, *The President's Page*, 50 A.B.A.J. 1005 (1964).

<sup>24</sup> See CAREY & DOHERTY, *supra* note 4, at 7.

<sup>25</sup> See AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT 1

the American Bar Association Canons, but rather it supplements and stresses certain portions of the Canons. The Trial Code was redrafted in **1963** and has been cited as authority and with approval by several appellate courts.<sup>26</sup>

The preamble to the Trial Code specifically provides that it expresses only minimum (not ideal) standards and should be construed liberally in favor of its fundamental purpose to improve the trial conduct of advocates.

### ***5. Enforcement of the Canons and Trial Code.***

Since the American and State Bar Associations and the American College of Trial Lawyers are not legislative tribunals, their Canons and Trial Code do not have the force of law except in states where they have been adopted by statute or by rules of the state's highest court.<sup>27</sup> The federal courts have no established code of ethical conduct, but the Federal Rules of Procedure, both civil and criminal, provide individual standards of ethical conduct.<sup>28</sup> The Canons and Trial Code, however, are regarded by the courts as wholesome standards of professional conduct,<sup>29</sup> and an attorney may be disciplined by a court for not observing them.<sup>30</sup>

Admittedly, the Canons are inadequate to provide specific answers for many cases that arise in daily practice. This is where the opinions of the American Bar Association Committee on Professional Ethics and, of course, the opinions of the ethics committees of the various state and local bar associations assist the practicing attorney and the courts in construing and interpreting the Canons.<sup>31</sup>

The Standing Committee on Professional Ethics of the American Bar Association was formed in **1914** to communicate to that

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(rev. version **1963**). However, it should be noted that the original ABA Canons were drafted in an era when the lawyer's primary function was in dealing with actual or potential litigation problems and are consequently oriented toward adversary proceedings. Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 579 (1961).

\**Forward*, AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT (rev. version **1963**).

<sup>27</sup> *In re* Cohen, 261 Mass. 484, 159 N.E. 495 (1928).

<sup>28</sup> Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 577 (1961).

<sup>29</sup> *Herman v. Acheson*, 108 F. Supp. 723 (D.D.C. 1952). See *Foreword*, *supra* note 26.

<sup>30</sup> See DRINKER 26-27, and cases cited therein.

<sup>31</sup> See ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 654 (1963) [hereafter cited as INFORMAL OPINIONS, No. —3—].

association information concerning the activity of state and local bar associations in respect to the ethics of the legal profession. In 1919, the Committee's name was changed to the Committee on Professional Ethics and Grievances, and by subsequent amendments to the bylaws of the Association it was authorized to express its opinions concerning proper professional conduct when consulted by members of the bar or by any officer or committee of a state or local bar association. The attorney requesting an opinion need not be one of the more than 123,000 members of the American Bar Association.<sup>32</sup>

The American Bar Association Committee's first formal opinion was published on 15 January 1924.<sup>33</sup> Since that time it has published some 316 formal opinions involving interpretations of the Canons which it believes to be of broad general interest. In addition, it has rendered more than 1,200 informal opinions in response to questions that arise less frequently over the years, with over 100 informal opinions being currently issued each year<sup>34</sup> under the name of the Committee of Professional Ethics since, in 1958, the Committee on Professional Grievances was split off as a separate independent committee.<sup>35</sup> Formal opinions, when issued, are published in the *American Bar Association Journal*, as are selected informal opinions.<sup>36</sup> Several of the informal opinions have concerned practice before military courts-martial.<sup>37</sup>

Although these American Bar Association and state ethical opinions are not binding on military advocates and tribunals, they do, of course, constitute persuasive authority and have been cited as such by a board of review.<sup>38</sup>

There are critics who state that, since the Canons and Trial Code have no built-in sanctions, they are unrealistic and deserve

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<sup>32</sup> DRINKER 31.

<sup>33</sup> *Id.*

<sup>34</sup> Armstrong, *A Re-Evaluation of the Canons of Professional Ethics — A Practitioner's and Bar Association Viewpoint*, 33 TENN. L. REV. 154, 156 (1966).

<sup>35</sup> ABA COMM. ON PROFESSIONAL ETHICS OPINIONS iii (Supp. 1964).

<sup>36</sup> Three compiled volumes of prior ethical opinions have been published by the ABA Committee on Professional Ethics: a 1957 bound volume, a 1964 paper supplement, and a 1966 soft cover unpaginated volume of informal opinions.

<sup>37</sup> INFORMAL OPINIONS, Nos. C-498 (1962) and 567 (1962). See INFORMAL OPINIONS, No. 879 (1965), relating to the propriety of writing a military commanding officer to state claims against a serviceman.

<sup>38</sup> See ACM S-17411, Seale, 27 C.M.R. 951, 954 (1958).

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to be **ignored**,<sup>39</sup> but they do not reckon with the strong restraining force activated by the acute personal embarrassment inherent in disciplinary proceedings together with the attendant impairment of professional reputation and possibility of disbarment.

### **B. APPLICABILITY OF THE CANONS OF ETHICS AND THE TRIAL CODE TO THE MILITARY LAWYER**

#### **1. *The Old Corps: Rocks and Shoals.***

The Canons of Ethics and the Trial Code are directly applicable as rules of professional conduct to military advocates practicing before courts-martial under the *Uniform Code of Military Justice*.<sup>40</sup> This is not a new innovation to the services brought about by the adoption of the Code in **1950**. Under the pre-Code practice, the 1937 edition of *Naval Courts and Boards* quoted excerpts from the Canons for the information and guidance of courts-martial personnel.<sup>41</sup> The Trial Code, of course, was not in existence prior to the Uniform Code.

#### **2. *Regulatory Sources Applying the Canons and Trial Code to Practice Under the UCMJ.***

*a. The Manual.* Paragraph **42** of the Manual provides generally for the conduct of counsel. Although the Canons are not cited directly in the Manual, appropriate portions thereof are included and paraphrased, some of which had previously been set out in *Naval Courts and Boards* before the enactment of the Code. Paragraph **42** sets up ethical standards for a military **bar**.<sup>42</sup> Additional ethical standards are prescribed in paragraphs *6a*, **44g**, *h*, **46b**, **48b**, *c*, *f*, **72b**, and **151b(2)** of the Manual. Although the Manual provisions do not incorporate all of the Canons, the regulations of The Judge Advocates General do, obviating the necessity to consider the effect of a violation by counsel of a Canon not incorporated into the Manual.

*b. Army Regulation No. 27-11 (5 March 1865).* Paragraph 2 of this regulation includes as grounds for suspension of counsel

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<sup>39</sup> See Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 137 (1966).

<sup>40</sup> See B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL 162 (1957), as to the applicability of the canons.

<sup>41</sup> NAVAL COURTS AND BOARDS 360 (rev. ed. 1937), quoting excerpts from Canons 3, 5, 6, 8, 9, 15, 16, 17, 18, 22, 37 and 44.

<sup>42</sup> LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL 27 (1951).

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the flagrant or continued violation of any specific rules of conduct prescribed for counsel (1) in paragraphs **42, 44, 46** or **48** of the Manual, or (2) in the Canons of Professional Ethics adopted by the American Bar Association, or (3) in the Code of Trial Conduct adopted by the American College of Trial Lawyers. Thus, in effect, the regulation adopts by reference both the Canons and the Trial Code as standards of professional conduct for advocates before courts-martial.

c. *Manual of the Judge Advocate General of the Navy*.<sup>43</sup> Section 0135b of the Navy JAG Manual provides that the Canons of Professional Ethics of the American Bar Association are considered to be generally applicable as rules of professional conduct for persons acting as counsel before Naval courts-martial. Additionally, the Navy JAG Manual cites paragraphs **42, 44, 46, and 48** of the Manual for Courts-Martial and quotes portions of the Canons for guidance.<sup>44</sup> It should be noted that all of the Canons are made applicable to the Navy, and the mere fact that Canons **6** (Conflicting Interests), **8** (Advising on Merits of Client's Case), **22** (Candor and Fairness), and **44** (Withdrawal from Employment as Attorney of Counsel) were specifically quoted in *Naval Courts and Boards* but not in the Navy JAG Manual does not detract from their applicability to present-day counsel.

d. *Coast Guard Supplement to MCM, 1951*. Section 0126c of this supplement provides that counsel in a court-martial case, whether lawyers or not, are to be guided by the Canons of Professional Ethics of the American Bar Association.<sup>45</sup>

Although neither the Navy JAG Manual nor the Coast Guard Supplement refers to the Trial Code, it should be noted that their provisions relative to professional conduct and legal ethics were published prior to the Trial Code's publication. The incorporation of the Trial Code in the Army Regulations—which is more recent than those of its sister services—indicates that the provisions of the Trial Code constitute a standard to guide and measure the conduct of counsel, which the other services will undoubtedly incorporate in any future regulations on the subject.

3. *Validity of the Application of the Canons and Trial Code*. Given the fact that the Manual and the regulations of the

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<sup>43</sup>(1961) [hereafter cited as NAVY JAG MANUAL].

<sup>44</sup>NAVY JAG MANUAL § 0135b, quoting portions of Canons 3, 5, 7, 9, 15, 16, 17, 18, 21, 24, 37 and 39.

<sup>45</sup>See CGCM S-21258, Vogt, 30 C.M.R. 746, 748 (1961).

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various services have incorporated the Canons and Trial Code, it remains to be demonstrated that authority for their action existed.

The Constitution of the United States empowers the Congress to make rules for the government and regulation of the land and naval **forces**.<sup>46</sup> Pursuant to that authority, Congress enacted the *Uniform Code of Military Justice* on 5 May 1950, effective 31 May 1951, as a code of criminal law and procedure applicable to all of the armed forces of the United States. Article 36 of the Code provides :

The procedure . . . in cases before courts-martial . . . may be prescribed by the President [of the United States] by regulations which shall, so far as he considers practicable, apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [the Code].

Similar authority to make such rules and regulations with respect to the Army had been given to the President under the pre-Code Articles of War, and it is upon that provision that the current authority with respect to all of the armed forces is **based**.<sup>47</sup> Article 36 has been held to be a valid delegation by Congress to the President of the power to issue regulations governing court-martial **procedure**.<sup>48</sup>

The President exercised the authority granted to him by Congress when he issued his Executive Order No. 10214<sup>49</sup> on 8 February 1951, promulgating the *Manual for Courts-Martial, United States, 1951*, effective 31 May 1951. The text of the Manual was published in the *Federal Register* on 10 February 1951.<sup>50</sup>

Article 140 of the Code further provides that the President is authorized to delegate any authority vested in him under the Code and to provide for the subdelegation of any such authority. In paragraph 43 of the Manual, the President delegated his authority relative to procedure before courts-martial and provided that The Judge Advocates General of the armed forces, in appropriate

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<sup>46</sup> U.S. CONST. art. I, § 8, cl. 14.

"Articles of War 38. Prior to the Code, the procedure for naval general courts-martial was never specifically provided by statute. J. SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE 306-07* (1953).

"See *United States v. Smith*, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962); *cf.* *United States v. Vierra*, 14 U.S.C.M.A. 48, 51, 33 C.M.R. 260, 263 (1963) (dictum).

<sup>49</sup> MCM, 1951, p. ix.

<sup>50</sup> 16 Fed. Reg. 1303-1469 (1951).

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departmental regulations, might announce rules defining professional or personal misconduct which would disqualify a person from acting as counsel before courts-martial.

In accordance with this delegated authority, the aforementioned Army, Navy, and Coast Guard provisions were issued, incorporating the Canons and Trial Code as standards of professional ethics and conduct applicable to advocates before courts-martial.

The crucial question, then, is whether the paragraphs of the Manual prescribing professional conduct of attorneys and the action of The Judge Advocates General of the various services in applying the Canons and the Trial Code were valid exercises of the rule-making power lawfully delegated by Congress in Article 36 of the Code. That issue has not been specifically decided by the Court of Military Appeals. However, the Court has clearly delineated the test. The Manual paragraphs and the regulations are valid and have the force of law, if they are not contrary to or inconsistent with the Code and do not conflict with other Manual provisions or principles of justice.<sup>51</sup> Clearly, the Canons and the Trial Code meet the test.

And, what is more important, the Court of Military Appeals in its decided cases has presupposed that the Canons are fully applicable without the necessity of tracing the legality of their incorporation into military practice via the provisions of the Manual and the regulations promulgated by the service Judge Advocates General. Consider the cases where the Court has cited the Canons. In *United States v. Kraskouskas*, the Court, in holding that an accused cannot be represented by a nonlawyer before a general court-martial, stated as one of its reasons that the code of ethics would not apply to the nonlawyer.<sup>52</sup> Similarly, in his dissent in *United States v. McCants*,<sup>53</sup> Judge Ferguson cites Canon 19 and quotes it verbatim, assuming without specifically stating, that the Canon is fully applicable to advocates before courts-martial.

In *United States v. Stone*,<sup>54</sup> the Court of Military Appeals cited

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"See *United States v. Smith*, 13 U.S.C.M.A. 105, 119, 32 C.M.R. 105, 119 (1962).

<sup>52</sup> 9 U.S.C.M.A. 607, 610, 26 C.M.R. 387, 390 (1958). The court surely did not mean to imply, however, that nonlawyer counsel at special courts-martial are not governed by the Canons. See notes 58 and 59 *infra* and accompanying text for applicability of canons to special courts-martial nonlawyer counsel.

<sup>53</sup> 10 U.S.C.M.A. 346, 352, 27 C.M.R. 420, 426 (1959).

<sup>54</sup> 13 U.S.C.M.A. 52, 56, 32 C.M.R. 52, 56 (1962).

Canon 19 in stating that testimony by a lawyer on behalf of his client is improper conduct, unless it involves purely formal matters or is essential to the ends of justice. Again the Court did not preface its citation of the Canon with any indication of the source of applicability of the Canons. In *United States v. Young*,<sup>55</sup> Judge Kilday, writing for the Court, stated that the disqualifications of counsel arising in both military and civilian prosecutions due to conflicts of interests or incompatible representation are resolved by adherence to the Canons of Ethics. Most recently, in *United States v. Lewis*,<sup>56</sup> the Court cited Canon 19 in condemning the fact that counsel testified from the witness stand.

These cases show that there is no doubt in the minds of the members of the Court of Military Appeals that the Canons are fully applicable to advocates before courts-martial.

The boards of review have also cited the Canons. In CM 410956, *Bostic*,<sup>57</sup> an Army board of review cited Canon 9 in a footnote in analogizing to the American Bar Association's rules forbidding an attorney to talk to the opposing party outside the presence of his counsel. Providing us with a specific answer to the applicability of the Canons to military counsel, the Coast Guard board of review in CGCM S-21258, *Vogt*,<sup>58</sup> held that counsel in a special court-martial case, whether lawyers or not, are to be guided by the Canons of Professional Ethics of the American Bar Association. Similarly in NCM S-58-01854, *Field*,<sup>59</sup> a Navy board of review cited Canon 15 as defining the duties of a nonlawyer counsel before a special court-martial.

#### 4. *The Canons and Trial Code Apply to All Specialties Within the Legal Profession.*

##### Canon 45:

The canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

##### Trial Code 28:

Although this Code of Trial Conduct is adopted by the American College of Trial Lawyers the College thinks the rules should apply to all lawyers wherever and by whom they may be employed.

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<sup>55</sup> 13 U.S.C.M.A. 134, 139, 32 C.M.R. 134, 139 (1962).

<sup>56</sup> 16 U.S.C.M.A. 146, 148, 36 C.M.R. 301, 304 (1966).

<sup>57</sup> 35 C.M.R. 511, 519 n.6 (1964), *pet. denied*, 15 U.S.C.M.A. 409, 35 C.M.R. 381 (1965).

<sup>58</sup> 30 C.M.R. 746 (1961).

<sup>59</sup> 27 C.M.R. 863, 873 (1958) (concurring opinion).



As demonstrated above, the services have incorporated the Canons and Trial Code by reference. The terms of the Canons and Trial Code are not restrictive and permit their application to the specialty of the practice of criminal law before military courts-martial.

### C. THE SEVERAL AFFIRMATIVE LOYALTIES OF THE MILITARY OFFICER-LAWYER

The Marine officer-lawyer is more than a mere citizen. He, together with his sister service counterparts, stands as a guardian of liberty, a minister of justice, an officer of the courts, his client's advocate, and a member of dual honorable and learned professions. In these several capacities, it is his duty to promote the interests of the Corps and his Country, to serve the cause of justice, to maintain the authority and dignity of the courts-martial system, and to be faithful to his clients, candid and courteous in his dealings with his fellow attorneys, and true to himself.

The succeeding parts will provide a detailed insight into the responsibilities of the military advocate to these five specified affirmative loyalties: (1) duty to the military service, (2) duty to the court, (3) duty to the client, (4) duty to fellow attorneys, and (5) duty to himself, together with the resolution of potential conflicts between them.

## 11. DUTY TO THE MILITARY SERVICE

Yours is the profession of arms . . . for a century and a half you have defended, guarded and protected . . . hallowed traditions of liberty and freedom, of right and justice . . . your guidepost stands out, . . . thundering those magic words: Duty, Honor, Country. General Douglas MacArthur, *Farewell Address at West Point*, 1962.

### A. MISSION OF THE MILITARY SERVICE

The most important thing in war will always be the art of defeating one's opponent in combat.<sup>60</sup> It is to the end of closing with and defeating the enemy in the field that the energies of the military commander and his forces are directed. The military attorney, as a special staff officer, exists to aid that commander in the performance of his mission. The military advocate filling a legal billet serves—he does not command. He is a team member to

<sup>60</sup> CLAUSEWITZ, *PRINCIPLES OF WAR* 17 (Gatzke transl, 1943).

assist in coping with court-martial processes during the urgencies of war as well as the conveniences of peace, thus freeing the commander to devote more time and energy to his primary responsibility to prepare to meet and defeat our nation's enemies.

### B. *LOYALTY TO MILITARY SUPERIORS*

In theory, there is no basic conflict between the duties of the advocate as an officer of the service and as a military lawyer. As a military officer, he offers his oath and his allegiance to the Constitution of the United States and agrees to discharge well and faithfully the duties of his office.<sup>61</sup> As a lawyer, he has sworn to support the Constitutions of the United States and his state and his client.<sup>62</sup> The two oaths and obligations are not inconsistent.<sup>63</sup>

The military advocate is never clientless. He is employed by the United States Government and owes true faith and allegiance to that client, as represented by the convening authority of his assigned military organization, until such time as he is released from that obligation to accept an individual defendant as his current client. Once the new attorney-client relationship has been established, his obligation is to the new client during the existence of the relationship, unimpaired by competing loyalties to other persons within the framework of that representation. In the event of conflict, his obligation is to his present client, but he must remember that he himself is a multifaceted personality. He is not, nor should he be, a one-case man. Accepting the advocate's responsibilities with reference to one client does not relieve him of his responsibility to other defendants to whom he has been assigned, provided the duties as to one do not overlap or conflict as to the others.

The trial counsel is in a similar position; until assigned to the trial of a particular court-martial, the convening authority is his client. But upon his assignment to trial, he does not with reference to that trial represent the convening authority as such. He represents solely the sovereignty of the United States, and that is not

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<sup>61</sup>See military officer's oath in 5 U.S.C. § 16 (1964).

<sup>62</sup>See recommended oath of admission for attorneys in ABA, CANONS OF PROFESSIONAL ETHICS, OATH OF ADMISSION TO THE BAR, CANONS OF JUDICIAL ETHICS, ALSA CREDO 8 (1962).

<sup>63</sup>But see Murphy, *The Army Defense Counsel: Unusual Ethics for an Unusual Advocate*, 61 COLUM. L. REV. 233, 237-40 (1961), for the opinion of an Army advocate that a basic conflict exists between the officer lawyer's obligation to his service and his client.

synonymous with the person of the convening **authority**.<sup>64</sup>

Certainly trial counsel is appointed by the convening authority, and much less aloofness necessarily marks the relationship of the trial counsel to the convening authority, as compared with that of the defense counsel. This is so because the trial counsel is charged with the responsibility of reporting to the convening authority and the staff judge advocate concerning the status of pending cases, the results of all trials, the possibility of court membership in a particular case being reduced below a quorum, the inadvisability of trial in certain instances, and all substantial irregularities in the charges or the appointing orders. But these facts do not give rise to an inference of control. The trial counsel cannot be reduced to the likeness of an automaton by binding and detailed instructions. "In this event a convening authority would both transgress the provisions of Article 37 [of the Code] and deprive the accused of the protections inherent in the requirement that the trial counsel of a general court-martial—as well as his learned friend for the defense—be a duly qualified **attorney**."<sup>65</sup>

Defense counsel, the law officer, and the members of the court are also designated by that convening authority for duty with the named court-martial, but the appointment does not make them instruments for the imposition of the convening authority's will. Each has a separate duty to perform and each must perform that duty free from any external personal prejudice or **influence**.<sup>66</sup>

Article 37 of the Code was enacted to curb any potential command influence and ensure freedom of action to the advocate. It provides, in part, that no convening authority or commanding officer shall censure, reprimand or admonish counsel before a court-martial with respect to the findings or sentence adjudged by the court or with respect to that counsel's functions in the conduct of the proceedings.

During the past 185 years, the court-martial practice of the United States has evolved from an inquisitorial into a real adversarial **proceeding**.<sup>67</sup> Under the Code, the accused is entitled to certified legal counsel at general courts-martial and defense

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<sup>64</sup> See *United States v. Olson*, 7 U.S.C.M.A. 242, 22 C.M.R. 32 (1966) (dictum); MCM, 1961, ¶ 44d; *United States v. Valencia*, 1 U.S.C.M.A. 416, 4 C.M.R. 7 (1952).

<sup>65</sup> *United States v. Haimson*, 6 U.S.C.M.A. 208, 218, 17 C.M.R. 208, 218 (1964).

<sup>66</sup> *United States v. Olson*, 7 U.S.C.M.A. 242, 22 C.M.R. 32 (1966) (dictum).

<sup>67</sup> Murphy, *supra* note 63, at 236.

counsel with legal qualifications equal or superior to those of the trial counsel at special **courts-martial**.<sup>68</sup>

The Court of Military Appeals has analogized the military defense counsel's duty of fidelity to his client to that of an attorney in a civilian criminal case<sup>69</sup> or to the standards of a civilian court-appointed counsel or public **defender**.<sup>70</sup> The Court has clearly pointed out that counsel, once appointed, owes his paramount allegiance to his client, the accused. In *United States v. Darring*,<sup>71</sup> it held that defense counsel should give as much information to his client as possible regarding appellate representation, and the decision concerning the requesting of such representation should only be predicated on the merits of the individual case and the accused's desires and not upon considerations of expediency or convenience to the service or its effect upon other courts-martial.

As stated by Judge Ferguson:

[I]t is [the defense counsel's] duty to advocate his client's cause and to support it in any manner consistent with the law and the canons of our profession. In short, he is an attorney for the accused, and his concurrent status as an officer in the armed services in nowise detracts from his professional duties."

Earlier regulations limiting the defense counsel's conduct of his client's defense to means that are "not inconsistent with military **regulations**"<sup>72</sup> and warnings against conducting the defense without "due regard for authority" have been entirely **eliminated**.<sup>74</sup> Of course the staff judge advocate is available at all times for consultation by the defense counsel relative to problems on which the latter might desire advice in connection with a full presentation of his **case**.<sup>75</sup> The theory of military law is that the staff judge advocate occupies a nonpartisan position of disciplin-

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<sup>68</sup> See *UCMJ* art. 27.

<sup>69</sup> See *United States v. McMahon*, 6 U.S.C.M.A. 709, 717, 21 C.M.R. 31, 39 (1956); *United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955). See also MCM, 1951, ¶ 48c.

<sup>70</sup> See *United States v. Horne*, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958).

<sup>71</sup> 9 U.S.M.A. 661, 26 C.M.R. 431 (1968).

<sup>72</sup> *United States v. Watkins*, 11 U.S.C.M.A. 611, 621, 29 C.M.R. 427, 437 (1960) (dissent).

<sup>73</sup> REGULATIONS FOR THE ARMIES OF THE UNITED STATES, 1910, § 977.

<sup>74</sup> Murphy, *supra* note 63, at 236.

<sup>75</sup> *United States v. Haimson*, 5 U.S.C.M.A. 208, 220, 17 C.M.R. 208, 220 (1954) (dictum).

ary proceedings.<sup>76</sup> Admittedly, in practice, conflict may occur between the position of the advocate as a representative of his client and his position as a military officer, but normally it arises by virtue of the nature of human personalities and not because the two duties are basically inconsistent.

In *United States v. Kitchens*,<sup>77</sup> the subject of the relations of defense counsel with the staff judge advocate and his assistant was drawn into clear focus. Defense counsel had raised the issue of command influence based on letters from the assistant staff judge advocate which the members of the court had seen. After the completion of the trial but before the trial of a co-accused, the assistant staff judge advocate called the defense counsel to his office and allegedly told him that "if he had not yet decided to live in peace in the office he would be dealt with accordingly." Defense counsel told the assistant staff judge advocate that he could not give up a legitimate defense. Shortly thereafter, the defense counsel received an efficiency rating from this officer that was substantially lower than two prior ratings received from that officer. The Court of Military Appeals vigorously condemned this form of pernicious command influence and recommended an investigation and also noted that punitive proceedings might be justified if the allegation was **established**.<sup>78</sup>

The difficult point is that, despite the protestations of the Court of Military Appeals against this unfair practice, the defense counsel's career may have been severely jeopardized by lowered efficiency reports that condemn by faint praise. To alleviate the problem, some have recommended that counsel be physically situated in an office apart from the staff judge advocate and that a different officer be assigned to prepare their efficiency reports.<sup>79</sup> Frankly, the limited number of military attorneys available to perform both court-martial and noncourt-martial work in the unit legal offices does not permit this luxury. An advocate does not cloister himself in an isolated ivory tower upon accepting appointment to represent a particular client. He still must perform his military duties and responsibilities in

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<sup>76</sup>United States v. Green, 5 U.S.C.M.A. 610, 615, 18 C.M.R. 234, 239 (1955) (dictum).

<sup>77</sup>12 U.S.C.M.A. 589, 31 C.M.R. 175 (1961).

<sup>78</sup>*Id.* at 592 n.3, 31 C.M.R. at 178 n.3.

<sup>79</sup>*See* Taylor, Trial and Defense Counsel Program for General Courts-Martial, 1962 (unpublished thesis at The Judge Advocate General's School, U.S. Army).

areas that do not affect his current attorney-client relationship.

Apart from assignment to a new organization, there is no real solution to an in-office situation characterized by conflicting personalities. The only answer for the advocate is that one must do what he must. In the discharge of his paramount responsibilities to an assigned client, he must stand on principle—provided it is undergirded with fact and law—against any real or fancied fear of disfavor and should not be influenced directly or indirectly by any considerations of self-interest.

### C. UPHOLDING THE LAW

It is axiomatic that counsel's responsibilities to the military service and himself preclude him from giving advice or assistance in violation of the law. Pause one minute, however, before moving on to the duty of counsel to the court, and consider the subtler variations. The advocate may not advise an imprisoned client what to do if he escapes from the **brig**,<sup>80</sup> nor may he advise a client who has gone absent without leave to hide because he may not get a fair **trial**.<sup>81</sup> Moreover, the attorney is under an ethical obligation to disclose to the proper authorities any information he has as to the whereabouts of a client who has escaped from lawful **custody**.<sup>82</sup>

## III. DUTY TO THE COURT

Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wiliest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere, in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the Bench and the Bar. Edward G. Ryan.

### A. TRIAL CONDUCT

#### 1. *Candor and Fairness.*

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<sup>80</sup> See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 150 (1932) [hereafter cited as OPINIONS, No. —].

<sup>81</sup> DRINKER 152. Informal Decision No. 14, ABA OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 628 (1957) [hereafter cited as Informal Decision No. —, ABA OPINIONS].

<sup>82</sup> OPINIONS, No. 155 (1936). But see OPINIONS, No. 23 (1930), which the Committee, in Opinion No. 155, limited to its particular facts.

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*a. The Rule.* Manual paragraph 42*b*, Canon 22, and Trial Code 23(a), (b):<sup>83</sup>

The conduct of counsel before the court and with each other should be characterized by honesty, candor, and fairness. Counsel should not knowingly misquote the contents of a paper, the testimony of a witness, the language or argument of opposing counsel, or the language of a decision or a textbook. He should not cite as authority a decision that he knows has been reversed or an official directive that he knows has been changed or rescinded. These latter and all kindred practices, are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

*b. The Case Law.*

(1) *General.* Our criminal processes are adversary in nature and rely upon the self-interests of the litigants and counsel for full and adequate development of their respective cases. The nature of the proceedings presupposes—or at least stimulates—zeal in the opposing lawyers. But their strife can pervert as well as aid the judicial process unless it is supervised and controlled. Accordingly, the overriding social interest in impartial justice vests the neutral law officer with the power to curb both adversaries.<sup>84</sup>

The trial counsel is entitled to try the case as he sees it, but his commendable desire to win a case must be tempered with a realization of his responsibility for ensuring a fair and impartial trial, conducted in accordance with proper legal procedures. However, the restrictions imposed upon him by virtue of his duty cannot be so strictly applied as to cause reversal of every case wherein he takes a step which results in the sustaining of a defense objection. A mere error of judgment does not necessarily reach the level of misconduct.<sup>85</sup> But in those instances where the rights and immunities of an accused would be exposed to serious and obvious abuse, prejudicial and excessive zeal on the part of the trial counsel will be curbed by the trial bench.<sup>86</sup>

Similarly, although it is the right of counsel for every litigant

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<sup>83</sup> Throughout this article, the texts of the Manual, Canons, and Trial Code have been consolidated where possible to reduce redundancy and paraphrased when necessary to comport with court-martial terminology. Although the rules thus set forth are not always direct quotations, they have been inset for emphasis and ease of reference.

<sup>84</sup> See *United States v. DeAngelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

<sup>85</sup> *United States v. Valencia*, 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).

<sup>86</sup> See *United States v. DeAngelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

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to press his claim even if it appears untenable, the interests of society in the preservation of courtroom control are not to be frustrated through unchecked improprieties of defense counsel.<sup>87</sup>

The responsibility of candor establishes an affirmative duty on the trial counsel to disclose any grounds which he knows may exist for challenge of court-martial personnel such as disqualification of a law officer who had signed the pretrial advice as an acting staff judge advocate.<sup>88</sup>

(2) *The Unrevealed Citation.* The lawyer, though an officer of the court and charged with the duty of candor and fairness, is not an umpire but an advocate. He is under no duty to refrain from making proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position. His personal belief in the soundness of his cause or of the authorities supporting it is irrelevant. However, an attorney is under an obligation to refrain from making misrepresentations, and he is also denied the luxury of material concealment generally regarded in the world of trade as “smart **business**.”<sup>89</sup>

The advocate has the function of presenting and arguing the applicable law to the law officer. It is ethically proper for him to rely on and cite unreported board of review decisions in arguments or briefs, even without advance notice to adverse counsel.<sup>90</sup> He is, however, prohibited from reading legal authorities or arguing the facts of other cases directly to the court members, except in instances such as a motion for a finding of not guilty or the question of the accused's sanity, where those members become the triers of the fact and, in effect, of the law as well.<sup>91</sup>

In recent years there has been discussion and dispute as to whether the attorney must disclose to the law officer a known decision adverse to his client's contentions and apparently unknown to his adversary. There is no obligation to the client to withhold knowledge of the applicable law. Rather, the obligation is to present the applicable law to the law officer.<sup>92</sup> The test in every case requiring disclosure of such a decision is whether or not it is one which the court should clearly consider in decid-

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<sup>87</sup>See *id.*

<sup>88</sup>*United States v. Schiller*, 5 U.S.C.M.A. 101, 17 C.M.R. 101 (1964).

<sup>89</sup>R. WISE, *LEGAL ETHICS* 174 (1966).

<sup>90</sup>INFORMAL OPINIONS, No. 667 (1963).

<sup>91</sup>See *United States v. Bouie*, 9 U.S.C.M.A. 228, 26 C.M.R. 8 (1958) ; *United States v. Fair*, 2 U.S.C.M.A. 621, 10 C.M.R. 19 (1963).



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ing the case and is not solely confined to controlling authorities which would be clearly decisive of the case at bar. This requirement must be sensibly interpreted, and a long string of board of review citations on a well-settled point need not be presented to the law officer to fulfill the spirit thereof.<sup>93</sup> After presentation of the authority, however, the advocate is fully justified in then attempting to distinguish the case or even to argue that it not be followed. The advocate's obligation is to represent his client fully in obtaining a determination of the law, not to conceal the applicable law.

A pretty fair country lawyer of some renown by the name of Abraham Lincoln also believed that adverse authorities should be cited. On his first appearance as an attorney before the Supreme Court of Illinois, he informed the court that, although he was unable to find any authority to support his position, he had found and submitted for the court's consideration several cases directly in point favoring his adversary.<sup>94</sup>

### **2. Attitude Toward Court Members.**

#### **a. The Rules.**

UCMJ article 39:

Whenever a court-martial is to deliberate or vote, only the members of the court shall be present. Any consultation of the court with counsel shall be made a part of the record and be in the presence of the accused, the defense counsel, the trial counsel, and in general court-martial cases, the law officer.

Manual paragraph 42b:

In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the members of the court.

Canon 23 and Trial Code 19(a) :

A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry with any court member, such as fawning, flattery, or actual or pretended solicitude for the comfort or convenience of the court members. Suggestions of counsel looking to the comfort or convenience of the court should be made to the law officer out of the hearing of the court members. Before and during the trial, counsel should

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<sup>92</sup> OPINIONS, No. 146 (1935). See Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575 (1961) ; DRINKER 78.

<sup>93</sup> OPINIONS, No. 280 (1949). But see Tunstall, *Ethics in Citation: A Plea for Re-Interpretation of a Canon*, 35 A.B.A.J. 5 (1949), arguing that the requirement for disclosure should be limited to controlling authorities.

<sup>94</sup> E. PARRY, THE SEVEN LAMPS OF ADVOCACY 19 (1924).

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avoid conversing or otherwise communicating privately with a court member on any subject whether pertaining to the case or not.

### Trial Code 19(b)-(e) :

A lawyer should disclose to the law officer and opposing counsel any information of which he is aware that a court member has or may have any interest, direct or indirect, in the outcome of the case, . . . unless the law officer and opposing counsel have previously been made aware thereof by voir dire examination or otherwise.

Subject to any limitations imposed by law, it is a lawyer's right, after the court has been discharged, to interview the members to determine whether their verdict is subject to any legal challenge. The scope of the interview should be restricted and caution should be used to avoid embarrassment to any court member or to influence his action in any subsequent case.

Before the court is sworn to try the cause, a lawyer may investigate the prospective court members to ascertain any basis for challenge, provided there is no communication with them, direct or indirect, or with any member of their families.

A lawyer should, immediately upon his discovery thereof, make full disclosure to the court of any improper conduct by any person toward any court member.

### Trial Code 20(a) :

In the voir dire examination of the court members, a lawyer should not state or allude to any matter not relevant to the case or which he is not in position to prove by admissible evidence.

*b. The Case Law.* Any improper contact between the prosecution and the members of the court creates a presumption of prejudice. That presumption is rebuttable, however. It is error for the trial counsel to make a pretrial inquiry of available court members to determine if they have conscientious scruples against imposing the death penalty in a prospective capital case.<sup>95</sup> Off-the-record private discussions of trial counsel with the president of a special court-martial during the trial<sup>96</sup> or presence of the trial counsel in a closed-court session<sup>97</sup> likewise constitute error.

Of course reality cannot be forsaken. Common sense must prevail in this area, and it is both necessary and proper for the

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<sup>95</sup> See CM 395341, Boone, 24 C.M.R. 400 (1957). Error was held to be non-prejudicial under the particular facts of this case, because the government met the burden of rebutting the presumption of prejudice.

<sup>96</sup> MCM, 1951, ¶53d; United States v. Bruce, 12 U.S.C.M.A. 410, 30 C.M.R. 410 (1961); United States v. Randall, 5 U.S.C.M.A. 535, 18 C.M.R. 159 (1955).

<sup>97</sup> See Ex parte Tucker, 212 Fed. 569 (D.C. Mass. 1913), a pre-UCMJ case

trial counsel to confer with the president of the court prior to the convening thereof to establish the time and place of convening and the applicable uniform.<sup>98</sup> Similarly, during a lengthy court-martial, witnesses, court members, and even counsel may unavoidably be thrown together in the normal course of shared essential military duties during recesses and adjournments especially in combat and isolated overseas commands. The attainable standard is that all unnecessary contact be avoided during the period of trial and that the contact required by military necessity strictly avoid any discussion relating to the case or related subject matter.<sup>99</sup>

During the challenging procedure at trial, the voir dire examination may properly extend into the predispositions or prejudices, if any, of the members in order to lay a foundation for challenges for cause or a peremptory challenge. Thus, the defense counsel may properly inquire on voir dire into the fixed preconceptions or inelastic attitudes of a court member regarding the type of punishment (including punitive discharge) that the member feels should be imposed for particular offenses or upon a particular accused.<sup>100</sup> Similarly, although the trial counsel may not influence referral of a case to get a partisan court panel, he is entitled to challenge members individually if he believes that they are predisposed to leniency.<sup>101</sup>

During the course of the trial proper, both counsel have an affirmative obligation to demonstrate care in handling exhibits marked for identification only. They should ensure that photographs, documentary, and real evidence are not displayed to the court members before being received into evidence. Insofar as their size permits, such items should be kept turned in a direction away from the court members.<sup>102</sup>

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wherein it was held that the presence of trial counsel for a short time during the closed session of a court-martial was a procedural error only and not ground for a writ of habeas corpus.

<sup>98</sup> See dissent of Quinn, C.J., in *United States v. Robinson*, 13 U.S.C.M.A. 674, 681, 33 C.M.R. 206, 213 (1963); MCM, 1951, ¶ 40b(1).

<sup>99</sup> See *United States v. Adamiak*, 4 U.S.C.M.A. 412, 418, 15 C.M.R. 412, 418 (1954); *United States v. Walters*, 4 U.S.C.M.A. 617, 633, 16 C.M.R. 191, 207 (1954).

<sup>100</sup> *United States v. Fort*, 16 U.S.C.M.A. 86, 36 C.M.R. 242 (1966).

<sup>101</sup> *United States v. Williams*, 11 U.S.C.M.A. 459, 29 C.M.R. 275 (1960).

<sup>102</sup> MCM, 1951, ¶ 44g. See *United States v. Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966); *United States v. Haimson*, 5 U.S.C.M.A. 208, 17 C.M.R. 208 (1954).

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When court members engage in improper and abusive questioning of the accused, the law officer should not require defense counsel to shoulder the burden of resisting the questioning at the expense of offending the interrogators. Although inaction by defense counsel under such circumstances has been held not to constitute a **waiver**,<sup>103</sup> there soon comes a point when he must intervene to protect his client adequately despite the possibility of nettled sensibilities, if the law officer fails to act. The influence of the prejudicial matter on the court members must be curbed. Three courses of action are open to the defense counsel: (1) object to the questioning, (2) challenge for cause the questioner who has departed from his role of impartial trier of the facts, or (3) move for a mistrial. Timidity in the face of wrongful action against his client is as unethical as legal skulduggery to preserve error in the record. Counsel's assurance of eventual appellate reversal is of little immediate comfort to the convicted client who must languish in crossbar hotel pending that appellate review.

It is considered unethical for counsel in his argument to refer to individual court members by **name**.<sup>104</sup>

Trial counsel is charged with the responsibility to call errors or irregularities to the notice of the court and may call the attention of a special court-martial president to a conflict between the announced sentence and the sentence worksheet after the court has **adjourned**,<sup>105</sup> but the defense counsel should be informed of such action and be afforded the opportunity to object or request additional instructions relative **thereto**.<sup>106</sup>

A troublesome area with reference to the relationship of counsel to members of the court-martial concerns the ethical considerations involved when counsel attempt to poll the court members as to their vote or contact court members after the trial for the counsel's own educational benefit or to determine whether the verdict is subject to any legal challenge. Both Rule 31d of the Federal Rules of Criminal Procedure and Trial Code

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<sup>103</sup> *United States v. Smith*, 6 U.S.C.M.A. 521, 20 C.M.R. 237 (1955); *United States v. Blankenship*, 7 U.S.C.M.A. 328, 22 C.M.R. 118 (1966).

<sup>104</sup> *INFORMAL OPINIONS*, No. C-739 (1963).

<sup>105</sup> *United States v. Liberator*, 14 U.S.C.M.A. 499, 34 C.M.R. 279 (1964). See *MCM*, 1951, ¶ 44g.

<sup>106</sup> *United States v. Norwood*, 16 U.S.C.M.A. 310, 36 C.M.R. 466 (1966).

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19(c) sanction such procedures, as do several opinions of the Committee of Professional Ethics of the Association of the Bar of the City of New York.<sup>107</sup>

Admittedly, it is frequent practice for counsel to talk to court members upon the conclusion of a trial to learn what factors influenced the result or to find evidence which could be used to impeach the verdict. However, in a 1934 opinion (No. 109), the American Bar Association Committee on Professional Ethics and Grievances held that a lawyer ethically has no right under Canon 23, after verdict, to seek out one or more members of a jury before whom he has tried a case and question them concerning how certain aspects of the case impressed them, what they thought of certain evidence on both sides of the case, and how certain members of the jury stood on certain questions, even assuming that the lawyer did so for the purpose of informing himself as to any mistakes he may have made in the presentation of evidence or of testing his judgment relative to challenging of court members.<sup>108</sup>

Critics of this opinion pointed out that since Canon 23 only proscribes contact with jurors before and during trial, the Canon impliedly sanctions post trial communications.<sup>109</sup> Opinion No. 109 still stands. However, its vitality has been undercut and overruled sub silentio by Informal Opinion No. 535 of the Committee, rendered 6 October 1962, wherein the Committee opined in a gratuitous statement that after the trial, as a matter of his self-education or when necessary to prevent fraud or a miscarriage of justice, counsel may, with entire propriety, interview the jurors.<sup>110</sup>

What then is the military ethic? The first point has been clearly decided at the board of review level. Members of a military court-martial may not be polled as to their vote.<sup>111</sup> Voting in courts-martial as to findings, sentence, and challenges is by secret written ballot, and a court member is bound by his oath,

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<sup>107</sup> N.Y.C. BAR ASS'N AND N.Y. COUNTY LAWYERS' ASS'N COMM. ON PROFESSIONAL ETHICS, OPINIONS, NOS. 285, 375, and 767 (1956).

<sup>108</sup> OPINIONS, No. 109 (1934). See Informal Decision No. 257, ABA OPINIONS 641 (1957).

<sup>109</sup> See DRINKER 84 n.38; Harnsberger, *Amend Canon 23 or Reverse Opinion 109*, 51 A.B.A.J. 157 (1965).

<sup>110</sup> INFORMAL OPINIONS, No. 535 (1962).

<sup>111</sup> CM 394430, Connors, 23 C.M.R. 636 (1957). See ACM 6751 (Rehearing), Tolbert, 14 C.M.R. 613 (1953) (dictum).

taken upon the convening of the court, that he will not disclose or discover the vote or opinion of any particular member upon a challenge or the findings or sentence unless required to do so before a court of justice in due course of law.<sup>112</sup>

Are court-martial counsel then ethically precluded from discussing the case at all with court members upon the conclusion of the trial for their own self-education? It would seem not. There are no military cases in point, but the rules set forth in Trial Code 19(c) and Informal Opinion No. 535 represent the modern and better-reasoned approach. Caveat, however, the scope of post trial communications with the court members should be restricted so as not to directly or indirectly delve into the vote or opinion of any member of the court upon a challenge or the findings or sentence or influence his action in future cases that may be referred to his court panel.

Loss of temper by counsel and threats to the court members by intemperate language are not only ethically improper but, human nature being what it is, may also ease his client's path directly to a federal penitentiary. During a discussion with regard to the compulsory production of witnesses, an individual civilian defense counsel in *United States v. DeAngelis*<sup>113</sup> threatened the court: "If you ever pronounce judgment on this accused without power to produce the witnesses, you will, each and every one, be held civilly liable."<sup>114</sup> Result? His officer-client's affirmed sentence amounted to dismissal, total forfeitures, confinement at hard labor for five years and a fine of \$10,000, and the attorney was condemned by the Court of Military Appeals for his flagrantly contemptuous conduct. Moral: If you can keep your head when all about you are losing theirs, you may save your client his,

### **3. *Respect and Courtesy: Dealings With the Law Officer.***

#### **a. *The Rules.***

Manual paragraph 42b :

**In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the law officer.**

Canon 1:

**It is the duty of the lawyer to maintain towards the Courts a respectful**

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<sup>112</sup> MCM, 1951, ¶ 114.

<sup>113</sup> 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

<sup>114</sup> *Id.* at 302-03, 12 C.M.R. at 68-59.

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attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Law officers not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judiciary officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

### Canon 3 and Trial Code 17:

Marked attention and unusual hospitality on the part of a lawyer to a law officer uncalled for by the personal relations of the parties, subject both the law officer and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the law officer as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a law officer special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the law officer's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

### Trial Code 18(a)–(c), (e):

During the trial, a lawyer should always display a courteous, dignified and respectful attitude toward the presiding law officer, not for the sake of his person, but for the maintenance of respect for and confidence in the judicial office. The law officer, to render effective such conduct, has reciprocal responsibilities of courtesy to and respect for the lawyer, who is also an officer of the court. The lawyer should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made. In this regard, he should not be deterred by any fear of judicial displeasure or punishment.

A lawyer should not discuss a pending case with the law officer without the opposing lawyer's presence, unless, after notice or request, the opposing lawyer fails or refuses to attend and the law officer is so advised. Except as provided by rule or order of the court, a lawyer should never deliver to the law officer any letter, memorandum, brief, or other written communication without concurrently delivering a copy to opposing counsel.

Subject to the foregoing, a lawyer may advise the law officer of any reason for expediting or delaying the decision.

### *b. The Case Law.*

(1) *General.* The law officer is not a mute and passive bystander until that moment when the court convenes for the trial

of the accused. To assist him in his preparation for trial, counsel should contact him to provide him with a copy of the charges and specifications and the appointing order, and to inform him of anticipated issues of law that might be raised at the trial.<sup>115</sup> Trial counsel should serve upon the defense counsel a copy of any prospective memorandum of issues which he submits to the law officer or have that counsel present during oral communications with the law officer.<sup>116</sup> Although the defense counsel may ethically give the law officer unilateral notice of a prospective defense issue, as a practical matter it is suggested that he also notify his adversary to preclude the necessity of trial counsel's requesting a time consuming continuance at trial to prepare to meet the surprise issue. Defense counsel should also advise the trial counsel and the law officer of the anticipated plea of the accused.<sup>117</sup>

When questionable matters arise during the course of the trial which a counsel does not wish to be brought to the attention of court members, counsel should request an in-court hearing, commonly known as a side-bar conference. The practice of such an in-court conference at the law officer's bench between the law officer, counsel for both sides, accused and the reporter in low tones which the court is unable to hear is both proper and useful for short discussions. The practice is recognized in the court-martial system.<sup>118</sup> For lengthy conferences with the law officer or where it is necessary to hear the testimony of witnesses out of the court's hearing, counsel should request the law officer to conduct an out-of-court hearing.<sup>119</sup> Out-of-court hearings are not authorized in special courts-martial, however, because the president of the court is a voting member who must rule on evidentiary questions subject to the objection of any member of the court.<sup>120</sup>

(2) *Criticism of the Law Officer.* Profane rejections of legal rulings handed down by law officer are unethical. The Court of Military Appeals will not tolerate any interference by either

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<sup>115</sup>United States v. Fry, 7 U.S.C.M.A. 682, 23 C.M.R. 146 (1957).

<sup>116</sup>Informal Decisions Nos. 251 and 253, ABA OPINIONS 640 (1957); DRINKER 78.

<sup>117</sup>See dissent of Quinn, C.J., in United States v. Robinson, 13 U.S.C.M.A. 674, 681, 33 C.M.R. 206, 213 (1963).

<sup>118</sup>See United States v. Ransom, 4 U.S.C.M.A. 195, 15 C.M.R. 195 (1954); MCM, 1951, app. 8a, at 514, which provides for the use of in-court conferences.

<sup>119</sup>United States v. Cates, 9 U.S.C.M.A. 480, 26 C.M.R. 260 (1958); MCM, 1951, ¶ 57g(2).

<sup>120</sup>United States v. Baca, 16 U.S.C.M.A. 311, 36 C.M.R. 467 (1966).



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counsel or court members with the substance, form, or tone of the law officer's rulings. Such rulings are final and are to be so treated. Only in this manner can the integrity of his office be assured and the judicious, fair, and impartial trial envisioned by the Code be guaranteed to the accused and to the public whose interests in military justice demand equal protection.<sup>121</sup>

It is the right of counsel to press his claim to obtain the law officer's considered ruling, even if it appears farfetched and untenable. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by an appellate tribunal when infringed by incorrect rulings at the trial level. But, if the ruling is adverse, the "aggrieved" counsel, be he military or civilian, does not have the right to resist that ruling, use provocative language, or threaten and insult the law officer.<sup>122</sup> Accordingly, in a trial commenced before the effective date of the Code, the Court of Military Appeals held it ethically improper for an individual civilian defense counsel, when questioned by the law member regarding his failure to call a witness who was present, to remark that the law member's question was the most absurd question he ever heard of, to ask the law member if he was trying to be funny, and to state that any first year law student would know the answer.<sup>123</sup> Although counsel has the unquestionable right to press his arguments vigorously, he may not flout the authority of the law officer or make a mockery of the requirement of decorous behavior.<sup>124</sup>

### 4. *Courtroom Conduct and Decorum.*

#### a. *The Rules.*

Canon 21 and Trial Code 22(b) :

A lawyer should be punctual in all court appearances and, whenever possible, should give prompt notice to the court and to all other counsel in the case, of any circumstances requiring his tardiness or absence.

It is the duty of the lawyer to be concise and direct in the trial and disposition of causes.

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<sup>121</sup> See *United States v. Burse*, 16 U.S.C.M.A. 62, 36 C.M.R. 218 (1966), where the Court of Military Appeals condemned the profane rejection of a law officer's ruling by the president of the court.

<sup>122</sup> *Sacher v. United States*, 343 U.S. 1 (1952).

<sup>123</sup> *United States v. DeAngelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

<sup>124</sup> *Id.*

Trial Code 20, 21, and 22(a), (c) :

In his opening statement a lawyer should not state facts that he has no reason to believe will be substantiated by the evidence.

A lawyer should not include in the content of any question the suggestion of any matter which is obviously inadmissible or which he knows is untrue.

A question should not be interrupted by an objection unless the question is then patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the court members.

Examination of court members and of witnesses should be conducted from the counsel table or from some other suitable distance except when handling documentary or physical evidence or when a hearing impairment or other disability requires that he take a different position.

A lawyer should rise when addressing, or being addressed by, the law officer, except when making brief objections or incidental comments.

While the court is in session, counsel should not smoke, assume an undignified posture, or, without the law officer's permission, remove his coat in the court room. He should always be attired in a proper and dignified manner.

Every effort consistent with the legitimate interests of the client should be made to expedite litigation and to avoid unnecessary delays, and no dilatory tactics should be employed for the purpose of harassing an adversary.

A lawyer should make every reasonable effort to prepare himself fully prior to court appearances. . . .

### *b. The Case Law.*

(1) *General.* The adherence to proper professional conduct and courteous decorum is the responsibility of every counsel appearing at trial. When counsel at trial are guilty of unprofessional behavior by engaging in frequent bickerings, verbal altercations, frivolous objections, interruptions, and exchanges based upon personalities, it is the law officer, not the president of the court, who has the authority to correct and chastise them.<sup>125</sup>

The professional conduct of advocates before courts-martial is a continuing matter of concern to the United States Court of Military Appeals. Judge Ferguson of that Court described the case of *United States v. Scoles*<sup>126</sup> as a shocking example of how a general court-martial should *not* be tried. In describing the case, he stated :

<sup>125</sup> CM 399282, Cannon, 26 C.M.R. 593 (1958).

<sup>126</sup> 14 U.S.C.M.A. 14, 33 C.M.R. 226 (1963).

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Its pages are filled with petty bickering between counsel, each side seemingly more intent upon scoring on the opposing attorney than in attending to its task of insuring that justice is done fairly and impartially in surroundings characterized with the dignity and decorum befitting the seriousness of the proceedings. We remind law officers of their authority—nay, duty—to require military and civilian counsel to conduct themselves in a manner befitting their profession and the courts before which they **practice**.<sup>127</sup>

In the *Scoles* case, the Court condemned the sharp practice employed by the trial counsel in personally requesting the president of the court to order it convened in fatigue uniforms to assist prosecution witnesses in their identification of the accused. The authority of the president of the court to prescribe the uniform may not be cleverly misused or perverted by trial counsel to become a weapon to ease the path of the prosecution in obtaining a conviction. Professional ethics and not Machiavellian principles must govern counsel's trial endeavors. The Court will not tolerate misuse of military authority to gain a desired end. "Under our system of law, means are quite as important as ends, and the name of the Republic should not be soiled at the hands of one charged with enforcing its laws."<sup>128</sup> The Court characterized trial counsel's unethical actions as " 'dirty business' to be vigorously condemned by everyone involved in military justice administration."<sup>129</sup>

As to uniform at trial, the accused is entitled to present himself before a military tribunal so attired as to make the most favorable impression upon the members of the court. The use of fatigue uniforms detracts from the dignity of the court.<sup>130</sup> Except in combat or under field conditions, the service uniform should be prescribed, and both trial and defense counsel have the responsibility to assure that the defendant appears properly dressed in a clean, pressed uniform bearing his correct insignia of rank and the ribbons, badges, and emblems to which he is entitled.

The Manual prescribes that the accused appear in uniform at the trial.<sup>131</sup> It is the responsibility of the service to see that he does so. Absentees may have no uniforms at the time of their return to military control. It is error to permit the accused to

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<sup>127</sup> *Id.* at 15–16, 33 C.M.R. at 227–28.

<sup>128</sup> *Id.* at 18, 33 C.M.R. at 230.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> MCM, 1951, ¶ 60.

stand trial in civilian clothes, and that error is compounded when the trial counsel makes reference to the fact in his closing argument as a fact supporting an inference of an intention to **desert**.<sup>132</sup>

A further word to counsel new at the military bar—and, assuredly, this point is not being overstressed: Confinement installations simply do not include modern dry cleaning facilities. Service uniforms, if any, of personnel in confinement are kept folded, neatly or otherwise, in **seabags** or similar containers. While that rumpled, lived in look, may be the fashion mode of today's young people, it has no place in the courtroom. While pressing this point, it is the trial counsel who must make arrangements to have the accused present at the trial. Have his unit get him there early enough that his defense counsel has time for further consultation before trial starts. It is too late for trial counsel, with his adversary, to start looking for the accused or to inspect his uniform ten minutes before the gavel sounds to start the court. To save embarrassment, think, plan ahead, and then supervise the execution of pretrial arrangements. Counsel must produce results, not excuses.

Trial counsel have been strongly criticized by the Court of Military Appeals for having a set of signals arranged with a courtroom spectator to alert the trial counsel to testimony involving classified **information**.<sup>133</sup> Whispering between counsel at the prosecution's table referring to the accused as a thief and scoundrel is improper and unjudicious. Personal hostility or excessive zeal upon the part of trial counsel is improper because it precludes the accused from receiving a fair presentation of the **evidence**.<sup>134</sup>

(2) *The Opening Statement*. An opening statement by counsel for either side is a recognized procedure in trials by court-martial.<sup>135</sup> Usually such opening remarks take place after arraignment, but prior to the hearing of evidence, and they normally consist of a brief comment on the issues to be tried and what respective counsel expect to prove.

The matter of the propriety of counsel's remarks in an opening

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<sup>132</sup> CGCM S-20255, Hoch, 20 C.M.R. 563 (1955), holding the error to be nonprejudicial under the facts of this case.

<sup>133</sup> United States v. Hauffman, 14 U.S.C.M.A. 283, 288, 34 C.M.R. 63, 68 (1963).

<sup>134</sup> See ACM 4455, DeAngelis, 4 C.M.R. 654 (1952), *aff'd* 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

<sup>135</sup> MCM, 1951, ¶ 44g (2).

statement at trial has been the subject of judicial review. A 1961 Air Force board of review case found no misconduct on the part of trial counsel when his opening statement alluded to a prior assault by accused on the victim and referred to the assault weapon as being honed to razor sharpness, even though a subsequent trial ruling by the law officer precluded him from presenting evidence to prove the prior assault and no evidence was later adduced as to the weapon's sharpness. The board found that there was nothing in the record which would indicate a deliberate flouting of the rules of evidence in order to prejudice the court against the accused and concluded that the trial counsel's comments did not exceed the bounds of fairness.<sup>136</sup>

The test is whether the general import of the evidence is consistent with the opening remarks. Trial counsel is entitled in his opening statement to make fair comment upon the testimony he expects to prove, and a slight variance will not constitute misconduct on his part or prejudice to the accused.<sup>137</sup>

(3) *Dilatory and Obstructive Tactics.* Obstructive and abusive actions of counsel flout the authority of the court, make a mockery of the requirement of decorous behavior, and impede the expeditious, orderly, and dispassionate conduct of the trial.<sup>138</sup> Although counsel unquestionably has the right to press his arguments vigorously and to explore freely all avenues favorable to his client, there is a limit beyond which he may not ethically go.

The deliberate use of frivolous or unwarranted dilatory tactics cannot be sanctioned.<sup>139</sup> The government is not at the mercy of defense counsel who continually claims unpreparedness, thereby indefinitely postponing trial. If such claims are frivolous or intended solely for the purpose of delay, recourse may be had by the removal of such dilatory counsel by competent authority and by replacing him with counsel who will effectively assist the accused.<sup>140</sup> Most civilian advocates find that they must work evenings when engaged in the trial of a lawsuit, and military counsel

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<sup>136</sup> ACM 17542, Moore, 31 C.M.R. 647, pet. denied, 12 U.S.C.M.A. 760, 31 C.M.R. 314 (1961).

<sup>137</sup> United States v. Hooper, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

<sup>138</sup> United States v. DeAngelis, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

<sup>139</sup> See Army Reg. No. 27-11, para. 1 (5 March 1965); NAVY JAG MANUAL § 135b(2).

<sup>140</sup> See United States v. Frye, 8 U.S.C.M.A. 137, 143, 23 C.M.R. 361, 367 (1957) (dissent) (dictum).

must be prepared to do likewise.<sup>141</sup>

Criminal litigation is not a game. Thus commented both the majority and the dissent in *United States v. Heinel*.<sup>142</sup> A rehearing was ordered in that case because defense counsel was denied a continuance to inspect a transcript of the former testimony of a witness. By way of dicta, there was unanimous agreement as to the consequences of defense counsel's improper trial tactics and failure to bear his trial responsibilities:

(a) Silence, when defense counsel has the duty to speak, may constitute a waiver. There is a responsibility for an accused, as well as for the Government, to deal fairly with the court. Defense counsel cannot knowingly and willfully withhold information of matters affecting the trial (such as an unauthorized view by the court members of the scene of the incident) on the chance that it may have a favorable effect and then, when disappointed, complain. Even rights guaranteed by the Constitution may be considered surrendered when the accused knowingly declines to avail himself of them at the trial. The Court of Military Appeals will not permit the defense counsel to remain silent and speculate cunningly as to a court's findings when he has a responsibility to speak out before those findings.<sup>143</sup>

Defense counsel must be consistent. His trial theory, tactics, and strategy will be binding on the accused. When he uses a trial incident for his client's advantage, he ordinarily cannot later contend on appeal that the incident was prejudicial to him.<sup>144</sup>

(b) Self-induced error by the defense counsel may not be used as a basis for appellate reversal. In a criminal case, the ultimate issue of the guilt or innocence of the accused is to be determined by a fair trial and not by the competence of counsel. But, it cannot serve the ends of justice to permit a defendant to prosecute one theory in the trial court and, finding it unsuccessful, not only to substitute another theory on appeal but also to claim error arising out of that which he himself has invited.<sup>145</sup> But the Court

<sup>141</sup> *United States v. Heinel*, 9 U.S.C.M.A. 259, 263, 26 C.M.R. 39, 43 (1958) (dissent).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*; see also *United States v. Wolfe*, 8 U.S.C.M.A. 247, 24 C.M.R. 57 (1957); *United States v. Walters*, 4 U.S.C.M.A. 617, 620, 16 C.M.R. 191, 202 (1954) (dictum).

<sup>144</sup> *United States v. Simonds*, 15 U.S.C.M.A. 641, 36 C.M.R. 139 (1966).

<sup>145</sup> See *United States v. Jones*, 7 U.S.C.M.A. 623, 23 C.M.R. 87 (1957); *United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962).

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of Military Appeals will decline to apply this rule of waiver where necessary to prevent a clear miscarriage of justice.<sup>146</sup>

Judge Latimer, in his dissent in *United States v. Heinel*,<sup>147</sup> however, felt that the defense counsel had ample pretrial opportunity to learn of and obtain a copy of the transcript. He opined that the holding of the majority ate away at the vitals of an effective court-martial system, leaving the law officer as putty in the hands of a clever but vexatious defense counsel. He commented:

The accused was represented by an aggressive trial defense counsel who used every stratagem to aid his cause. He represented his client well but, in my view, he proceeded under a theory that a trial by court-martial is a game in which the prize goes to the defense lawyer who can delay the final judgment, confuse the issues, and hamper the progress of trial by making numerous dilatory motions."<sup>148</sup>

and concluded: "He played his part well, but I am not willing to applaud the performance."<sup>149</sup>

Similarly, with reference to the instructions given by the law officer to the court members on the elements of the offenses charged, the defense counsel cannot assume that he has no responsibility whatsoever for protecting the interests of the accused and insuring the fair and orderly administration of justice by raising appropriate objections to improper procedures. The Court of Military Appeals is not willing to see court-martial trials become a game where a sly defense counsel can acquiesce in erroneous instructions merely to build a record for obtaining reversal on appeal. It is the duty of the defense counsel to see that the theory of the case most favorable to his client is adequately presented to the court. Not only must he be prepared in advance to argue for the submission of a proper framework of law to the court members, he should also be prepared to submit proposed instructions to which the defense view of the evidence can be fitted. Defense counsel does justice neither to the accused nor to his duty as an officer of the court when he relies principally on error and appellate review to protect his client.<sup>150</sup>

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<sup>146</sup> *United States v. Brux*, 15 U.S.C.M.A. 597, 36 C.M.R. 95 (1966); *United States v. Masusock*, 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951).

<sup>147</sup> 9 U.S.C.M.A. 259, 265, 26 C.M.R. 39, 43 (1958).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 267, 26 C.M.R. at 47.

<sup>150</sup> *United States v. Smith*, 2 U.S.C.M.A. 440, 442-43, 9 C.M.R. 70, 72-73 (1953). Counsel cannot however be required to submit proposed instructions.

A defense counsel has been criticized for obstructive tactics in refusing to permit an accused to answer the law officer's essential question as to guilt during an out-of-court hearing to determine the providency of the defendant's guilty plea. The Court of Military Appeals stated that the defense counsel should assist, rather than attempt to restrict, the law officer in fully developing the circumstances surrounding the plea.<sup>151</sup>

### **5. Criminal Prosecution and Defense.**

#### **a. The Rules.**

#### **UCMJ article 38:**

The trial counsel of a general or special court-martial shall prosecute in the name of the United States.

The accused shall have the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel duly appointed pursuant to article 27. Should the accused have counsel of his own selection, the duly appointed defense counsel, and assistant defense counsel, if any, shall, if the accused so desires, act as his associate counsel; otherwise they shall be excused by the president of the court.

#### **Manual paragraph 44g(1):**

Although the primary duty of the trial counsel is to prosecute, any act, such as the conscious suppression of evidence favorable to the defense, which is inconsistent with a genuine desire to have the whole truth revealed is prohibited,

#### **Canon 5 and Trial Code 4:**

The trial counsel's primary duty is not to convict but to see that justice is done. Evidence which appears credible and which clearly tends to prove the accused's innocence should not be suppressed.

The secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

It is the duty of the defense counsel, regardless of his personal opinion as to the guilt of the accused, to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence, to raise all valid defenses and, in case of conviction, to present all proper grounds for probation or in mitigation of punishment. A confidential disclosure of guilt alone does not require a withdrawal from the case.

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United States v. Walters, 4 U.S.C.M.A. 617, 631, 16 C.M.R. 191, 205 (1954); MCM, 1951, ¶ 73c(2).

<sup>151</sup> United States v. Palacios, 9 U.S.C.M.A. 621, 26 C.M.R. 401 (1958).



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However, after a confidential disclosure of facts clearly and credibly showing guilt, a lawyer should not present any evidence inconsistent with such facts. He should never offer testimony which he knows to be false.

The crime charged should not be attributed to another identifiable person unless evidence introduced or inferences warranted therefrom raise at least a reasonable suspicion of such person's probable guilt.

*b. The Case Law.* The responsibilities and duties of trial counsel or defense counsel in a court-martial are among the most important that can be imposed on a military officer. Provision was made in the Code for defense counsel to protect the rights of the accused, and for trial counsel fairly and accurately to prosecute in the name of the United States. Further provision in this regard is made in Executive Order 10214 publishing the Manual, by which the President, as Commander-in-Chief, implemented the Code. Military defense counsel who fails to exert every lawful effort in furtherance of an accused's rights and privileges—technical or otherwise—is himself flaunting the will of Congress and the order of his Commander-in-Chief. So also does trial counsel who fails fairly, fully, and adequately to present the prosecution's case. A trial counsel or defense counsel who does not seriously discharge his duties to the best of his ability with a sober understanding that such duties are among the most important tasks that he will be called upon to perform as an officer has failed to discharge an important trust.<sup>152</sup>

The Court of Military Appeals has defined the duties of trial and defense counsel before courts-martial and their relationship to the court. They represent their respective clients in an adversary proceeding scrutinized by opposing counsel under the supervision of the law officer. Although both are considered officers of the court,<sup>153</sup> the partisanship of their advocacy for their clients differs. The basic duty of an advocate in an adversary system is to do that which, within the framework of the honorable and legitimate means known to law, is for the client's best interests. Furthermore, as trial lawyers know, the advocate generally must

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\*\*\*CGCM S-19369, Branigan, 3 C.M.R. 515 (1952).

<sup>152</sup> See Ferguson, J., in *United States v. Kraskouskas*, 9 U.S.C.M.A. 607, 610, 26 C.M.R. 387, 390 (1958), and *United States v. Stone*, 13 U.S.C.M.A. 52, 56, 32 C.M.R. 52, 56 (1960).

be a partisan advocate if he is to achieve maximum effectiveness.<sup>154</sup>

*Defense counsel is an advocate for the accused, not an amicus to the court.*<sup>155</sup> Furthermore, he is a partisan advocate for his accused client.<sup>156</sup> As an example of this position, consider the case of **ACM S-3923, Boese**.<sup>157</sup> There, after the trial counsel had announced that there were no previous convictions, defense counsel stated that the record should be checked. The court recessed for that purpose and, after the recess, the records of two previous convictions were admitted into evidence. The sentence awarded by this special court-martial included a bad conduct discharge, which would not have been permissible but for the previous convictions. The board of review set aside so much of the sentence as was based on the previous convictions. It held that the unexplained action of defense counsel in calling the court's attention to the previous convictions was prejudicial to his client's interests. Counsel's duty in this situation was to marshal the matters properly in evidence in the way most favorable to his client, not to offer evidence against him.

However, the trial tactics of the defense must be within and not without the truth and the law. The common notion that in a criminal case the prosecution is bound to a high degree by the ethics of advocacy, whereas the defense counsel is bound by little or none, has been the subject of much reconsideration. There has been an increasing protest against that philosophy of advocacy which would allow the defense to treat the law as a mere game, while holding the prosecution to the highest standards of fair play and candor.<sup>158</sup>

Judge Warren E. Burger of the Court of Appeals for the District of Columbia has stated:

It must be remembered that there is not a dual standard of conduct,

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<sup>154</sup> See Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132 (1966).

<sup>155</sup> *United States v. Mitchell*, 16 U.S.C.M.A. 302, 36 C.M.R. 458 (1966); *Ellis v. United States*, 356 U.S. 674 (1958).

<sup>156</sup> See dissent of Ferguson, J., in *United States v. Young*, 13 U.S.C.M.A. 134, 141, 32 C.M.R. 134, 141 (1962), wherein he refers to the partisan advocacy of both defense counsel and counsel for the government at an article 32 pretrial investigation. See also Murphy, *The Army Defense Counsel: Unusual Ethics for an Unusual Advocate*, 61 COLUM. L. REV. 233 (1961).

<sup>157</sup> 6 C.M.R. 608 (1962). But see OPINIONS, No. 287 (1953).

<sup>158</sup> Tuttle, *The Ethics of Advocacy*, 18 A.B.A.J. 849, 851 (1932).

one for the prosecutor and one for the defense counsel. Nor is there a different standard of professional duty as between paid or unpaid counsel. The fact that improper conduct of a prosecutor is more readily dealt with by reversal of convictions should not lead defense counsel to believe that such conduct goes unnoticed by the court.<sup>159</sup>

Trial counsel occupies an anomalous position. His role is not that of the truly partisan advocate, but rather his primary duty, as a representative of the government, is to see that justice is done.<sup>160</sup>

In *United States v. Valencia*,<sup>161</sup> in assessing the limitations to be placed on the conduct of the trial counsel, the Court of Military Appeals said:

He is representative, not of a party to ordinary civil litigation, but of the sovereign state. It is his primary duty to see that justice is done. [Citation omitted.] We have no desire to quell the natural desire of counsel to win a case with which he is associated. However, in the case of the trial counsel, this quite commendable zeal must be tempered with a realization of his responsibility for insuring a fair and impartial trial, conducted in accordance with proper legal procedures. This duty has a peculiar significance in the conduct of court-martial trials, in view of the historical status of the "trial judge advocate" as the legal representative of both the accused and the Government."

And in the course of its opinion in the case of *Berger v. United States*,<sup>163</sup> the Supreme Court of the United States stated:

The United States Attorney [trial counsel] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. *But, while he*

<sup>159</sup> *Jackson v. United States*, 297 F.2d 195, 198 (D.C. Cir. 1961) (concurring opinion).

<sup>160</sup> *United States v. Johnson*, 3 U.S.C.M.A. 447, 13 C.M.R. 3 (1953). *But see* *United States v. Haimson*, 5 U.S.C.M.A. 208, 218, 17 C.M.R. 208, 218 (1954), to the effect that the trial counsel is at least in some degree a "partisan"; Latimer, J., in his separate opinion in *United States v. Beatty*, 10 U.S.C.M.A. 311, 315, 27 C.M.R. 385, 389 (1959), quoting a Georgia state court of appeal decision to the effect that the public prosecutor is necessarily a "partisan."

<sup>161</sup> 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).

<sup>162</sup> *Id.*, at 418, 4 C.M.R. at 10.

<sup>163</sup> 295 U.S. 78 (1935).

*may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*<sup>164</sup> [Emphasis added.]

There are limitations, of course, on how far trial counsel must go to fulfill his ethical obligations. As stated by Judge Latimer in his dissent in *United States v. Beatty*, the trial counsel does not have the burden of impeaching his own witnesses, briefing defense counsel on the evidence which is readily obtainable, assisting defense counsel in the preparation of his case, or advising defense counsel what evidence should be introduced. A trial is an adversary proceeding and the essentially conflicting interests of opposing counsel must be considered.<sup>165</sup>

It is axiomatic, however, that trial counsel, coming into possession of facts favorable to an accused but unknown to him, should either present them to the court or, at the very least, disclose them to the defense.<sup>166</sup> However, the trial counsel is not obligated to present at the trial proper all the proof adduced during the article 32 investigation, so long as testimony material to the defense is not suppressed.<sup>167</sup>

In military criminal cases, the defense counsel has available to him on behalf of his client much more direct and generally broader means of discovery than would normally be available to him in civilian criminal practice. In the ordinary general court-martial case, all relevant evidence against the accused in the hands of the government is made directly available to defense counsel in the article 32 pretrial investigation,<sup>168</sup> and he can also call witnesses on behalf of his client and request the investigating officer to obtain other evidence which may be relevant. Also at the trial proper, the accused's rights to subpoena witnesses and to make motions for appropriate relief give him practically unlimited means for the production of favorable evidence.<sup>169</sup> However, the

<sup>164</sup> *Id.* at 88.

<sup>165</sup> *United States v. Beatty*, 10 U.S.C.M.A. 311, 318, 27 C.M.R. 385, 392 (1959). See MCM, 1951, ¶ 44h.

<sup>166</sup> Quinn, C.J., in *United States v. Stringer*, 4 U.S.C.M.A. 494, 505, 16 C.M.R. 68, 79 (1954) (dissent).

<sup>167</sup> See *United States v. Petrowske*, 13 U.S.C.M.A. 330, 32 C.M.R. 330 (1962); *United States v. Malumphy*, 13 U.S.C.M.A. 60, 62, 32 C.M.R. 60, 62 (1962) (dissent); *Harris v. Sanford*, 78 F. Supp. 963 (N.D. Ga. 1947).

<sup>168</sup> See UCMJ art. 32.

<sup>169</sup> See MCM, 1951, ¶ 34d, *e. Compare* FED. R. CRIM. P. 6(e) with UCMJ art. 32.

availability of machinery for extensive discovery and production of evidence does not entitle defense counsel to use that machinery for improper purposes, and proper discovery of documentary evidence requires that the documents be relevant to the subject matter of the inquiry and that the request be reasonable before the defense counsel is entitled to obtain them.<sup>170</sup>

The advocate is more than a hired brain and voice; the arms which he wields should be used by him as a warrior, not as an assassin.<sup>171</sup> The adversary system is infused with tacit restraints governing both the prosecution and the defense. The partisan advocate fulfills his responsibilities when his zeal for his client's cause promotes a wise and informed decision of the case by the impartial triers of the fact. He fails to fulfill his role and trespasses against the obligations of professional responsibility when his desire to win at all costs leads him to distort and obscure the court members' understanding of the case, rather than to provide them with a needed perspective as to the accused's theory of the case.<sup>172</sup>

### 6. *Discovery of Fraud.*

#### a. *The Rules.*

Manual paragraph 48c :

It is improper for counsel to tolerate any manner of fraud or chicane.

Canons 41 and 15 and Trial Code 25:

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court, a party, or other counsel, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane.

b. *The Case Law.* While the fundamental requirement of a fair and impartial hearing applies to presentencing procedures, an important basic policy governing such proceedings requires that

<sup>170</sup> United States v. Franchia, 13 U.S.C.M.A. 315, 32 C.M.R. 315 (1962).

<sup>171</sup> E. PARRY, THE SEVEN LAMPS OF ADVOCACY 18 (1924).

<sup>172</sup> Professional Responsibility : Report of the Joint Conference, 44 A.B.A.J. 1159 (1968).

as full a picture as possible be presented to assist the court in imposing a proper sentence; nevertheless, the accused is not permitted to portray a false impression of the economic situation of his wife and child to the court in the guise of extenuation or mitigation.<sup>173</sup> Note should be taken of a New York case, *Matter of Hardenbrook*,<sup>174</sup> where an attorney who insisted on the truth of his client's testimony in a civil case when he knew it to be false was barred.

### **7. Expressing Personal Belief.**

#### **a. The Rules.**

Manual paragraphs **44g(1), 48c :**

It is improper for the trial counsel or defense counsel to assert before the court his personal belief **as** to the guilt or innocence of the accused.

#### **Canon 15:**

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

#### **Trial Code 20(h) :**

A lawyer should not assert in argument his personal belief in the integrity of his client or of his witnesses or in the justice of his cause which is unrelated to a fair analysis **of** the evidence touchng these matters.

**b. The Case Law.** It is no proper concern of the court that counsel is personally convinced by the evidence he has presented. The appearance of undue influence on the court must be avoided, since it is the independent responsibility of each court member to resolve impartially the question of the accused's guilt or innocence in accordance with the law and the evidence admitted in court, within the dictates of his own conscience, not in accordance with what counsel say they have **proved**.<sup>175</sup> It has also been held error for the trial counsel to express his personal belief that the testimony of the accused was a lie.<sup>176</sup>

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<sup>173</sup> CM 411402, Stevenson, 34 C.M.R. 655, *pet. denied*, 15 U.S.C.M.A. 670, 36 C.M.R. 478 (1964).

<sup>174</sup> 135 App. Div. 634 (1909), *aff'd* 199 N.Y.539 (1910).

<sup>175</sup> ACM 5651, Robinson, 7 C.M.R. 618 (1952), *pet. denied*, 2 U.S.C.M.A. 691, 8 C.M.R. 178 (1953).

<sup>176</sup> CM 409603, Reddick, 33 C.M.R. 587 (1963). *But see* United States v. Doctor, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956).

### 8. *Personal Experiments.*

#### a. *The Rules.*

Trial Code 12:

A lawyer should never conduct or engage in experiments involving any use of his own person or body except to illustrate in argument what has been previously admitted in evidence.

b. *The Case Law.* Immediately prior to the trial in *United States v. McCants*,<sup>177</sup> the trial counsel received two potential exhibits: a rifle and a cartridge. He thereupon, while outside the courtroom, loaded the cartridge into and then extracted it from the weapon. Thereafter, during the trial when a firearms examiner had testified for the defense that the round in question had never been extracted from the rifle because it bore no markings, the trial counsel testified in rebuttal as to his experiment and then, in closing argument, stressed the conflict between the expert's testimony and his pretrial experiment when arguing that the rifle was loaded, making it a dangerous weapon at the time of the offense.

The Court of Military Appeals in the *McCants* case said that it looked with disfavor on the procedure employed by the trial counsel. The Court stated that it was unnecessary for the trial counsel to become involved because another service member, familiar with the operation of the rifle in question, could have performed the experiment. It concluded that the error constituted poor judgment on the part of the trial counsel and nonconformance with professional standards of conduct, but did not require reversal under the particular facts of the case. The case was reversed on other grounds.

Judge Ferguson dissented as to the majority's opinion regarding the experiment, citing Canon 19 and pointing out that, in effect, trial counsel created the evidence. Although the point was not spelled out, trial counsel had tampered with the evidence prior to trial and could have placed marks on the cartridge that were not there when he received it. As the majority opinion indicated, the proper solution would have been for trial counsel to have the expert witness, not counsel, conduct the experiment in open court during cross-examination.

Informal Opinion No. 914 (1966) of the American Bar Associa-

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<sup>177</sup> 10 U.S.C.M.A. 346, 27 C.M.R. 420 (1959).

tion's Committee on Professional Ethics held that it is unethical conduct for an attorney to substitute other persons for the true defendants at the defendant's table in open court to mislead the court. A similar practice foisted on the court in a general court-martial convened prior to the Code was condemned, and the defense counsel was later tried and convicted for delay of the court based upon his unethical tactics.<sup>178</sup>

### **9. *Publicity and Newspaper Discussion.***

#### **a. *The Rules.***

Manual paragraphs **42b, 53e** :

As publication in the public press, or on the radio or television, of the circumstances of a pending case may interfere with a fair trial and otherwise prejudice the due administration of justice, counsel should refrain from discussing such circumstances with representatives of the press, radio, or television unless authorized by the convening authority or other competent superior authority. The taking of photographs in the courtroom during an open or closed session of the court, or broadcasting the proceedings from the courtroom by radio or television will not be permitted without the prior written approval of the Secretary of the Department concerned.

#### **Canon 20:**

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

#### **Judicial Canon 35:**<sup>179</sup>

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

#### **Trial Code 24 :**

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<sup>178</sup> Shapiro v. United States, 26 B.R. 107 (1943).

<sup>179</sup> ABA CANONS OF JUDICIAL ETHICS No. 36.



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A lawyer should try his cases in court and not in the newspapers or through other news media. He should not publish, cause to be published, or aid or abet in any way, directly or indirectly, the publication in any newspaper or other documentary medium, or by radio, television or other device, of any material concerning a case on trial or any pending or anticipated litigation, calculated or which might reasonably be expected to interfere in any manner or to any degree with a fair trial in the courts or otherwise prejudice the due administration of justice. If extreme circumstances of a particular case require a statement to the public, it should not be made anonymously and reference to the facts should not go beyond quotation from the records and papers on file in court or other official documents. No statement should be made which indicates intended proof or what witnesses will be called, or which amounts to comment or argument on the merits of the case.

*b. The Case Law.* The provisions of Canon 20 have been the subject of much dispute among attorneys for some time. Clearly, however, even though the Canon refers only to newspapers because it was drafted prior to the development of television and radio, it includes within its scope and meaning the means of public communication developed since its adoption in 1908.<sup>180</sup> The Manual provision, of course, does cover all the media, and despite one's own preferences, it must be recalled that the provisions of the Manual which are not contrary to or inconsistent with the Code have the force and effect of law.<sup>181</sup> Ethics opinions have held radio or television broadcasts of court proceedings from the courtroom to be improper.<sup>182</sup>

It is not a question of freedom of the press which here concerns us. The press and all other news media are free to print whatever is in the public record. But, when an attorney on one side publishes statements before or during the trial of a case concerning evidence to be offered or alleged facts about the case, a counterstatement from the opposing attorney may well be called for, and in the ensuing battle of publicity, the public or the press, without benefit of the rules of evidence, may influence the decision in the case to the detriment of the rights of the litigants. It is not the function of an advocate to try his case outside the courtroom, and gratuitous comments made publicly or through news media about the case, before it is finally disposed of by the court, violates the spirit of the governing ethical rules.<sup>183</sup>

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<sup>180</sup> INFORMAL OPINIONS, NO. 805 (1965).

<sup>181</sup> United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

<sup>182</sup> OPINIONS, Nos. 67 (1932) and 212 (1941).

<sup>183</sup> INFORMAL OPINIONS, NO. 805 (1965).

Of course military trials are public, and if a local news media considers a court-martial of sufficient public interest to detail a reporter to follow the trial developments, there is no prejudice to the accused in the reporter's attendance at public sessions of the court. This sort of reportorial coverage is of everyday occurrence in civilian criminal cases.<sup>184</sup>

Nor is a press conference by the accused and a later press release, approved by the convening authority, prejudicial to an accused, where the accused insisted on holding the press conference and the subsequent press release was no more than a factual report of what had occurred up to the time of its release.<sup>185</sup>

The question of what information should not be divulged to the news media, in cases where a release has been authorized, still remains. Opinion No. 31 of the Ethics Committee of the Colorado Bar Association<sup>186</sup> provides that members both of the bar and of the press have a duty to refrain from publishing, in criminal proceedings: (1) any prior criminal record of the accused; (2) any alleged confession or admission of fact bearing upon the guilt of the accused; (3) any statement of a public official as to the guilt of the accused; (4) any statement of counsel's personal opinion as to the accused's guilt or innocence; and (5) any comment upon evidence, credibility of any witness or matter which has been excluded from evidence. In addition to these five categories, a proposed amendment to Canon 20 also would exclude any comment on the results of or the defendant's refusal to take any test or examination, the identity of prospective witnesses except the victim, and the possibility of a plea of guilty to the offense or a lesser included offense.<sup>187</sup>

## 10. *Treatment of Witnesses and Litigants.*

### a. *The Rules.*

Manual paragraph 42b :

<sup>184</sup> ACM 8803, Berry, 16 C.M.R. 842, 861, *pet. denied*, 5 U.S.C.M.A. 843, 17 C.M.R. 381 (1954).

<sup>185</sup> WC NCM 58-00063, Henderson, 29 C.M.R. 717 (1968).

<sup>186</sup> The content of this opinion, adopted 6 June 1964, is contained in Sears, *A Re-Evaluation of the Canons of Professional Ethics—A Professor's Viewpoint*, 33 TENN. L. REV. 146, 152 (1966). The opinion was based largely on the Report of the Published Comment on Pending Litigation of the Committee on the Bill of Rights of the Association of the Bar of the City of New York, presented to the annual meeting of that association on 11 May 1954. *See also* OPINIONS, No. 199 (1940).

<sup>187</sup> Advisory Committee on Fair Trial and Free Press, *Proposed Amendment to Canon 20*, reproduced in 10 N.J. ST. B.J. 1608 (1967).

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In performing their duties before courts-martial counsel should . . . treat adverse witnesses and the accused with fairness and due consideration.

### Canon 18:

A lawyer should always treat adverse witnesses and suiters with fairness and due consideration, and he should never minister to malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

### Trial Code 15(c), (d) :

A lawyer may advertise for witnesses to a particular event or transaction but not for witnesses to testify to a particular version thereof.

A lawyer should never be unfair or abusive or inconsiderate to adverse witnesses or opposing litigants, or ask any question intended only to insult or degrade the witness. He should never yield, in these matters, to suggestions or demands of his client or allow any malevolence or prejudice of the client to influence his actions.

**b. The Case Law.** It is improper conduct for a trial counsel to threaten a defense witness for testifying on the accused's behalf.<sup>188</sup> Similarly, it is improper for trial counsel to continue the questioning of a witness in open court after he has repeatedly refused to answer questions on the basis of his privilege against self-incrimination.<sup>189</sup> Such continued questioning in effect adds weight to the prosecution case while effectively denying the defense counsel an opportunity to cross-examine. The solution in questionable cases, of course, is to have counsel and the law officer question the witness in an out-of-court hearing relative to his continued refusal to testify.<sup>190</sup>

Improper examination of a witness by the trial counsel that is persistent and contumacious is prejudicial and cannot be cured by an order directing that it be expunged from the record and disregarded.<sup>191</sup>

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<sup>188</sup> "See *United States v. Grady*, 13 U.S.C.M.A. 242, 32 C.M.R. 242 (1962) (dictum).

<sup>189</sup> *United States v. Bolden*, 11 U.S.C.M.A. 182, 28 C.M.R. 406 (1960); CM 411430, Bricker, 35 C.M.R. 566 (1965).

<sup>190</sup> *Id.*

<sup>191</sup> See *United States v. O'Briski*, 2 U.S.C.M.A. 361, 8 C.M.R. 161 (1953) (dictum),

And, a last word of caution when advising clients who are witnesses in the court-martial of another: It will be no defense to a witness who wrongfully refuses to testify after receipt of a grant of immunity, that he so refused on the basis of the erroneous advice of counsel.<sup>192</sup> Know the law before attempting to advise a client how to act in accordance therewith.

## B. IMPROPER EVZDENCE

### 1. *Testimonial Evidence.*

Proper preparation by trial and defense counsel requires consideration of the pertinent rules of evidence so that counsel will seek to introduce only competent evidence at the court-martial.<sup>193</sup> Questions should be directed to the eliciting of testimony which is relevant to some issue properly before the court and which, under the general rules of evidence, is competent as proof of such issue. This does not mean, however, that counsel must be absolutely sure of the admissibility of certain testimony before seeking to present it to the court, for it is proper to offer testimony of doubtful relevancy or competency; but conduct on the part of counsel which displays a deliberate disregard of the rules of evidence in an attempt to influence or confuse the members of the court is highly improper.<sup>194</sup>

Although the form and content of questions put to witnesses is largely within the discretion of examining counsel, certain types of questions are improper and may be prohibited in the discretion of the ruling officer. Among those questions that are generally considered improper are the following types :

- a. Ambiguous or indefinite questions.<sup>195</sup>
- b. Misleading questions. Accordingly, questions which assume facts not in evidence, or misquote facts about which the witness has testified, are improper.<sup>196</sup> Similarly, questions should not be asked for the purpose of suggesting matters known not to exist, nor questions that are clearly inadmissible and are asked, without

<sup>192</sup> United States v. Kirsch, 15 U.S.C.M.A. 84, 35 C.M.R. 56 (1964).

<sup>193</sup> MCM, 1951, ¶¶ 44f(3), 48g.

<sup>194</sup> United States v. Johnson, 3 U.S.C.M.A. 447, 452, 13 C.M.R. 3, 8 (1953); United States v. Valencia, 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).

<sup>195</sup> MCM, 1951, ¶ 149c(2). See United States v. Berthiaume, 5 U.S.C.M.A. 669, 684, 18 C.M.R. 293, 308 (1955) (dissent). See also United States v. Russell, 3 U.S.C.M.A. 696, 14 C.M.R. 114 (1954); CM 350178, Taylor, 2 C.M.R. 438, 442, pet. denied, 1 U.S.C.M.A. 716, 4 C.M.R. 173 (1952).

<sup>196</sup> MCM, 1961, ¶ 149c(2). NCM 258, Stockdale, 13 C.M.R. 640, 543 (1953).

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expectation of answer, to prejudice the court members.<sup>197</sup>

c. Multiple questions contained in a single question.<sup>198</sup>

d. Previously asked and answered questions.<sup>199</sup>

e. Argumentative questions which have no valid purpose concerning the impeachment of testimony.<sup>200</sup>

f. Unnecessarily accusing, insinuating, defaming, harassing, annoying or humiliating questions which have no legitimate or reasonable impeachment basis.<sup>201</sup>

g. Leading questions during direct or redirect examination,<sup>202</sup> except as to (1) preliminary or introductory matters; (2) ignorant, youthful, or timid witnesses; (3) inadvertent, erroneous statements; (4) directing attention to a particular subject; or (5) hostile witnesses.<sup>203</sup>

To aid the law officer (or president of the special court-martial) in his task of ruling initially on the admissibility of evidence, there is imposed upon counsel the duty of objecting to evidence considered to be inadmissible. The specific grounds for the objection must be stated, and ordinarily new bases may not be raised for the first time on appeal.<sup>204</sup>

### 2. Inflammatory Matters.

It is elementary that the prosecution should refrain from offering any sort of evidence for an inflammatory purpose. However, if the item of proof is admissible for a legitimate purpose, the fact that it may also possibly tend to possess a shocking aspect which might conceivably excite the passion of the court members is not, in and of itself, ground for reversal.<sup>205</sup> The trial counsel

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<sup>197</sup> MCM, 1951, ¶ 149c(3). ACM 7761, Schreiber, 16 C.M.R. 639, 672 (1954), *aff'd*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955).

<sup>198</sup> MCM, 1951, ¶ 149c(2). NCM 258, Stockdale, 13 C.M.R. 540, 543 (1953).

<sup>199</sup> CM 366778, Bills, 13 C.M.R. 407, 412 (1953); CM 353183, Phillips, 9 C.M.R. 186, 198 (1952), *aff'd*, 3 U.S.C.M.A. 137, 11 C.M.R. 137 (1953).

<sup>200</sup> See J. MUNSTER & M. LARKIN, *MILITARY EVIDENCE* 349 (1959), and cases cited therein.

<sup>201</sup> MCM, 1951, ¶¶ 54a, 149b(1). United States v. Berthiaume, 5 U.S.C.M.A. 669, 684, 18 C.M.R. 293, 308 (1955) (dissent); ACM S-2302, Whitaker, 5 C.M.R. 539, 559 (1952) (concurring opinion).

<sup>202</sup> United States v. Bigelow, 11 U.S.C.M.A. 529, 29 C.M.R. 343 (1960); United States v. Randall, 5 U.S.C.M.A. 535, 18 C.M.R. 159 (1955); United States v. Smith, 3 U.S.C.M.A. 15, 11 C.M.R. 15 (1953).

<sup>203</sup> MCM, 1951, ¶ 149c, ACM 18943, Crocker, 35 C.M.R. 725, 736 (1964).

<sup>204</sup> United States v. Brown, 10 U.S.C.M.A. 482, 28 C.M.R. 48 (1959). MCM, 1951, ¶ 48g.

<sup>205</sup> United States v. Bartholomew, 1 U.S.C.M.A. 307, 314, 3 C.M.R. 41, 48 (1952).

has a right to offer whatever evidence he thinks best suited to help the court-martial understand the testimony, provided he does not exceed the bounds of propriety by using unduly inflammatory items. He is not compelled to accept a defense offer to stipulate those facts which photographs, such as those of a murder victim's blood-covered head, were intended to corroborate.<sup>206</sup> The law officer has wide discretion in the admission of evidence of this kind.<sup>207</sup> The test is whether the probative value of the evidence outweighs the nature of the exhibit.<sup>208</sup>

Accordingly, the following items have been held to be admissible over defense objections that they served only to arouse the passions of the court members to the prejudice of the accused: skull and skin of a deceased female victim,<sup>209</sup> colored photographs of bruises on an assault victim,<sup>210</sup> photograph of a blind aged female assault victim,<sup>211</sup> colored photographs and transparencies of a deceased child showing some limited dissection during the course of the autopsy,<sup>212</sup> photographs of wounds on the body of a homicide victim,<sup>213</sup> sketch of a female body showing physical injuries suffered by a rape victim,<sup>214</sup> and a photograph of the body of a child rape-homicide victim.<sup>215</sup>

Similarly, although trial counsel should avoid inflammatory comments during argument, facts and circumstances interwoven with the offense need not be shunned, even though they cast the accused in an unfavorable light.<sup>216</sup> Accordingly, in closing argument in a murder trial it was held that trial counsel did not overstep the bounds of propriety and fairness when he characterized the act as a "cold blooded murder" and referred to the accused as an otherwise "nice chap who has his own private philosophy of who should live and who should die" and who had convened a board in which he was not only the convening author-

<sup>206</sup> *United States v. Lee*, 4 U.S.C.M.A. 571, 16 C.M.R. 145 (1954).

<sup>207</sup> *United States v. Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

<sup>208</sup> *United States v. Thomas*, 6 U.S.C.M.A. 92, 19 C.M.R. 218 (1955); CM 412739, Coleman, 36 C.M.R. 574 (1965), *pet. denied*, 36 C.M.R. 541 (1966).

<sup>209</sup> *United States v. Thomas*, 6 U.S.C.M.A. 92, 19 C.M.R. 218 (1955).

<sup>210</sup> CM 400743, Swisher, 28 C.M.R. 470, *pet. denied*, 28 C.M.R. 414 (1959).

<sup>211</sup> *United States v. Bartholomew*, 1 U.S.C.M.A. 307, 3 C.M.R. 41 (1952).

<sup>212</sup> ACM 17412, Houghton, 31 C.M.R. 579 (1961), *aff'd*, 13 U.S.C.M.A. 3, 32 C.M.R. 3 (1962).

<sup>213</sup> *United States v. Harris*, 6 U.S.C.M.A. 736, 21 C.M.R. 58 (1956).

<sup>214</sup> *United States v. Bennett*, 7 U.S.C.M.A. 97, 21 C.M.R. 223 (1956).

<sup>215</sup> *United States v. Hurt*, 9 U.S.C.M.A. 735, 779, 27 C.M.R. 3, 47 (1958).

<sup>216</sup> *United States v. Day*, 2 U.S.C.M.A. 416, 9 C.M.R. 46 (1953).

ity, judge and jury but in fact was the "lord high executioner."<sup>217</sup>

### 3. *Polygraph Devices and Truth Serums.*

It is well settled that neither the results of a "lie detector" interrogation nor a truth serum (sodium amytal or pentothal) test is admissible in a trial by court-martial.<sup>218</sup> The right of refusal to take a lie detector test falls within the privilege against self-incrimination, and it is improper for the trial counsel to introduce such evidence or argue the same.<sup>219</sup>

In *United States v. Ledlow*,<sup>220</sup> the Court of Military Appeals stated that the principal reason why the results of polygraph examinations are inadmissible lies in the probability that the court members would attribute undue significance to those results in their ultimate determination of the accused's guilt or innocence. Additionally, the tests are not infallible and are subject to the perils of conscious deception by a suspect.<sup>221</sup>

However, the mere fact that an accused is interrogated with the aid of a polygraph does not render a subsequently obtained admission or confession inadmissible in a trial by court-martial.<sup>222</sup> Accordingly, when evidence of a polygraph examination (although not the results thereof) is adduced during the determination of the admissibility of such a confession or admission, it is necessary for the law officer to give detailed instructions to advise the court members of the limited purposes for which the references to the polygraph examination were before the court and to guide the members past the shoals of prejudicial misconception by advising them not to speculate upon the results of the examination.<sup>223</sup>

### 4. *Reference to Prior Misconduct and Judicial Proceedings.*

The rule has long been established in both the civilian community and at military law that evidence of offenses or acts of

<sup>217</sup> *United States v. Lee*, 4 U.S.C.M.A. 571, 16 C.M.R. 145 (1954).

<sup>218</sup> *United States v. Massey*, 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955), *United States v. Bouchier*, 5 U.S.C.M.A. 15, 22, 17 C.M.R. 15, 22 (1954). *Cf.* *United States v. Wolf*, 9 U.S.C.M.A. 137, 25 C.M.R. 399 (1958).

<sup>219</sup> ACM 14909, *Cloyd*, 25 C.M.R. 908 (1958).

<sup>220</sup> 11 U.S.C.M.A. 659, 29 C.M.R. 475 (1960).

<sup>221</sup> *United States v. Massey*, 5 U.S.C.M.A. 514, 18 C.M.R. 138 (1955).

<sup>222</sup> *See United States v. McKay*, 9 U.S.C.M.A. 527, 26 C.M.R. 307 (1958) (dictum); CM 410956, *Bostic*, 35 C.M.R. 511 (1964, *pet. denied*, 15 U.S.C.M.A. 409, 35 C.M.R. 381 (1965); ACM 19180, *Driver*, 35 C.M.R. 870, *pet. denied*, 35 C.M.R. 478 (1965).

<sup>223</sup> *See* ACM 19180, *Driver*, 35 C.M.R. 870, *pet. denied*, 35 C.M.R. 478 (1965).

misconduct of the accused, other than those charged, are generally inadmissible where their only relevance is to show the accused to be a "bad guy" with criminal dispositions or propensities. The rationale is that the intrusion of such evidence may endanger the integrity and essential fairness of the **proceeding**.<sup>224</sup> However, recognized exceptions to this basic rule authorize the introduction of such evidence to establish the identity of the accused as the perpetrator of the offense charged, the accused's ability to commit the offense, the plan or design of the accused, intent or guilty knowledge on the part of the accused, motive, or *modus operandi*, or to rebut an issue raised by the **defense**.<sup>225</sup>

Accordingly, it is prejudicial error for trial counsel to attempt to impeach an accused by cross-examining him about prior acts of misconduct not resulting in conviction of a felony or crime of moral **turpitude**.<sup>226</sup> The accused cannot be tarred with innuendoes or insinuations of the possible commission of despicable crimes, and his credibility thus impaired, to weaken his defense in an attempt to strengthen the government's case. Although a witness other than the accused may be impeached by showing he has committed an act of misconduct (without conviction) affecting his credibility, every departure from the norm of human behavior may not be shown on the pretext that it affects **credibility**.<sup>227</sup>

Paragraph 153b(2)(b) of the Manual adopts the federal court rule, under which it is proper to impeach the credibility of a witness by proving a prior conviction without first questioning the witness concerning such conviction.<sup>228</sup> In the absence of a conviction, counsel is bound by the witness' answer concerning commission of prior acts of misconduct and may not introduce independent evidence thereof even though the witness denies the **act**.<sup>229</sup>

<sup>224</sup> *United States v. Kirby*, 16 U.S.C.M.A. 517, 37 C.M.R. 137 (1967); *United States v. Lewis*, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966); *United States v. Hoy*, 12 U.S.C.M.A. 554, 31 C.M.R. 140 (1961).

<sup>225</sup> See MCM, 1951, ¶ 138g; U.S. DEP'T OF ARMY, PAMPHLET NO. 27-172, *MILITARY JUSTICE-EVIDENCE* 60-68 (2d ed. 1962).

<sup>226</sup> *United States v. Russell*, 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964); *United States v. Robertson*, 14 U.S.C.M.A. 328, 34 C.M.R. 108 (1963).

<sup>227</sup> *United States v. Berthiaume*, 5 U.S.C.M.A. 669, 18 C.M.R. 293 (1955); *United States v. Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60 (1952).

<sup>228</sup> *United States v. Weeks*, 15 U.S.C.M.A. 583, 36 C.M.R. 81 (1966); *United States v. Moore*, 5 U.S.C.M.A. 687, 18 C.M.R. 311 (1955). See *Williams v. United States*, 3 F.2d 129 (8th Cir. 1924).

<sup>229</sup> *United States v. Robertson*, 14 U.S.C.M.A. 328, 34 C.M.R. 108 (1963); *United States v. Shepherd*, 9 U.S.C.M.A. 90, 25 C.M.R. 352 (1958).



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In the absence of some special consideration or the intervention of some Manual or other binding rule, it is error to elicit that a witness, as well as an accused, has been proceeded against in the juvenile court, and the admission of such evidence is cause for reversal if it materially prejudices the substantial rights of the accused. In the case of minors, the policy of protecting the infant outweighs the necessity of impeaching his veracity.<sup>230</sup> But the shield of public policy which guards against disclosure of juvenile misdeeds cannot be used to pervert justice by protecting the accused against disclosure of his own testimonial untruths.<sup>231</sup>

Evidence that one of several accused entered a plea of guilty or was convicted on a separate trial is not admissible on the issue of guilt of another accused. This rule applies not only when the accused are charged with the same offense, but it also extends to a situation in which the offenses charged arose out of the same circumstances. Every defendant has the right to have his guilt or innocence determined by the evidence against him and not by what has happened with regard to a criminal prosecution against someone else.<sup>232</sup>

It is also prejudicial error for the trial counsel to question the accused as to admissions of guilt which he had made during a preliminary inquiry by the law officer into the providence of a plea of guilty entered at an earlier trial which was terminated by the declaration of a mistrial, or which he had made at the present trial where a plea of not guilty was entered because of subsequent statements inconsistent with the plea of guilty.<sup>233</sup>

Finally, in presenting evidence as to a charge of breach of restraint while under correctional custody, it is neither necessary nor permissible to prove the offense for which the correctional custody was imposed. Proof simply of the status of correctional custody is sufficient. To permit proof of the offense for which the custody was imposed in effect gives the court an opportunity to

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"United States v. Yanuski, 16 U.S.C.M.A. 170, 36 C.M.R. 326 (1966) (as to witnesses); United States v. Roark, 8 U.S.C.M.A. 279, 24 C.M.R. 89 (1957) (as to the accused).

<sup>231</sup> See United States v. Kindler, 14 U.S.C.M.A. 394, 400, 34 C.M.R. 174, 180 (1964).

<sup>232</sup> United States v. Humble, 11 U.S.C.M.A. 38, 28 C.M.R. 262 (1959); MCM, 1951, ¶ 140b.

<sup>233</sup> United States v. Barben, 14 U.S.C.M.A. 198, 33 C.M.R. 410 (1963).

again punish for the original offense, rather than for the breach of restraint alone.<sup>234</sup>

### 5. *Command Opinions Relative to the Case.*

It is unethical for trial counsel to bring to the attention of the court any sort of intimation of the views of the convening authority or his staff judge advocate with respect to matters within the jurisdiction of the court either as to the findings or the sentence.<sup>235</sup> It is also improper for trial counsel to refer to departmental policies, such as the separation of thieves from the service.<sup>236</sup>

### 6. *Reliance of the Accused on ~~His~~ Rights Against Self-Incrimination.*

The Court of Military Appeals has consistently held that pre-trial reliance by the accused upon his rights under article 31 of the Code, by declining to make a statement, is inadmissible in evidence against him. It so held in *United States v. Jones*,<sup>237</sup> where the Court determined that portions of the accused's pretrial statement, indicating that he invoked article 31 when asked why he had become involved in the theft of a generator, should have been masked out prior to the statement's submission into evidence; in *United States v. Andrews*,<sup>238</sup> where testimony had erroneously been permitted concerning the refusal of the accused to submit to a blood alcohol test; in *United States v. Russell*,<sup>239</sup> a case where the trial counsel improperly called attention to the fact that the accused had not taken advantage of favorable odds by submitting to a blood test; in *United States v. Tackett*,<sup>240</sup> where an investigator was incorrectly permitted to testify that the accused refused to make a statement without consulting counsel; and in *United States v. Brooks*,<sup>241</sup> where criminal investigators were

<sup>234</sup> See *United States v. Mackie*, 16 U.S.C.M.A. 14, 36 C.M.R. 170 (1966). See also *United States v. Yerger*, 1 U.S.C.M.A. 288, 3 C.M.R. 22 (1952).

<sup>235</sup> *United States v. Lackey*, 8 U.S.C.M.A. 718, 25 C.M.R. 222 (1958). See *United States v. Haimson*, 5 U.S.C.M.A. 208, 7 C.M.R. 208 (1954). See also MCM, 1951, ¶ 44g.

<sup>236</sup> *United States v. Fowle*, 7 U.S.C.M.A. 349, 22 C.M.R. 139 (1956).

<sup>237</sup> 16 U.S.C.M.A. 22, 36 C.M.R. 178 (1966). See also *United States v. Martin*, 16 U.S.C.M.A. 531, 37 C.M.R. 151 (1967).

<sup>238</sup> 16 U.S.C.M.A. 20, 36 C.M.R. 176 (1966).

<sup>239</sup> 15 U.S.C.M.A. 76, 35 C.M.R. 48 (1964).

<sup>240</sup> See 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966). See also *United States v. Stegar*, 16 U.S.C.M.A. 569, 37 C.M.R. 189 (1967).

<sup>241</sup> See 12 U.S.C.M.A. 423, 31 C.M.R. 9 (1961). See also *United States v.*

improperly permitted to relate that the accused had relied upon article 31 of the Code. Error in *Brooks* was compounded by permitting cross-examination of the accused as to the reasons for his silence.

Article 31 of the Code preserves to the accused before a court-martial the full benefit of the fifth amendment and extends and enlarges the benefits of that constitutional safeguard. It has been held to be prejudicial error to permit the prosecution to rebut defense evidence that the accused was mentally incapable of exercising volition in making certain pretrial statements by presenting evidence that the accused had previously declined to make a statement and had requested counsel.<sup>242</sup> And, in *United States v. Kemp*,<sup>243</sup> the trial counsel was not even permitted to counter the defense's cross-examination by showing that the reason government psychiatrists were unable to formulate an opinion as to the accused's sanity was due to the accused's refusal to talk to them, even though he did communicate to defense psychiatrists who opined that he was incapable of premeditating in a homicide case. In this frame of reference, it should also be noted that counsel are prohibited from referring to the official character of Technical Manual 8-240 on psychiatry.<sup>244</sup>

### IV. DUTY TO THE CLIENT

It is better to risk saving a guilty person than to condemn an innocent one. Voltaire, *Zadig*, ch. 6.

#### A. ASSIGNMENT AS COUNSEL

##### 1. Commencement and Characteristics of Relationship.

###### a. The Rules.

#### Canon 4

A lawyer *assigned* as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his **best** efforts in his behalf.

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Bays, 11 U.S.C.M.A. 767, 29 C.M.R. 583 (1960); *United States v. Armstrong*, 4 U.S.C.M.A. 248, 15 C.M.R. 248 (1954).

""*United States v. Kavula*, 16 U.S.C.M.A. 468, 37 C.M.R. 88 (1966).

<sup>243</sup> 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

<sup>244</sup> *United States v. Allen*, 11 U.S.C.M.A. 539, 29 C.M.R. 355 (1960).

## Canon 35:

A lawyer's responsibilities and qualifications are individual. His relation to his client should be personal, and his responsibility should be direct to his client.

**b. The Case Law.** When defense counsel enters upon the defense of his client in a contested case, he, like the combatant, must use the weapons and practices that are available to him. Agreement with his adversary to the contrary is never open to him, unless he considers it to be to his client's **advantage**.<sup>245</sup> He is not an officer of the court in the same sense that pertains to the law officer. His primary duty is to serve his client. In a litigated case, it means service to his client alone and not in any part to his government on matters relative to that case. In criminal litigation, he can serve no master but his client; however, his client employs him together with his professional honor. The ethics of his profession are part of his **honor**.<sup>246</sup>

Article 27(a) of the Code provides that the convening authority shall appoint a trial counsel and a defense counsel together with such assistants as he deems necessary or appropriate for each general and special **court-martial**.<sup>247</sup> Until such time as they are assigned to a specific case, counsel are government employees with the convening authority of their organization as their client.

Attorneys in unit legal offices, especially those rendering legal assistance, must use care to ensure that an attorney-client relationship as to criminal matters is not inadvertently established. Army **regulations**<sup>248</sup> and policy in the Naval Service prohibit legal assistance officers from giving advice where the subject matter is, or will be, the subject of a court-martial action. However, if in fact an attorney-client relationship was formulated, such regulations cannot operate to nullify that **relationship**.<sup>249</sup>

The fundamental requirements for the creation of the attorney-client relationship are that the attorney be accepted as such by the

<sup>245</sup> United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958); NCM S-57-01656, Vincent, 24 C.M.R. 506, 509 (1957).

<sup>246</sup> See Stayton, *Cum Honore Officium*, 19 TEXAS B.J. 765 (1956); Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

<sup>247</sup> See also MCM, 1951, ¶ 6a.

<sup>248</sup> Army Reg. No. 608-50, para. 1 (28 April 1965); JAGAA Bull. No. 1965-3A, para. VJ (4 March 1965).

<sup>249</sup> See United States v. McCluskey, 6 U.S.C.M.A. 545, 551 n.1, 20 C.M.R. 261, 267 n.1 (1955).

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client and that the attorney not expressly refuse to accept the relationship when in consultation with the client.<sup>250</sup> There is more to creating the relationship of attorney and client than the mere publication of an order of appointment. The relationship is personal and privileged. It involves confidence, trust, and cooperation, and an accused is entitled to protest and request the appointment of other counsel if he has just cause for complaint against the appointee, such as incompetence or hostility.<sup>251</sup>

Military personnel on active duty or persons employed by the armed forces are not permitted to solicit or accept fees of any kind from an accused as reimbursement for acting as his counsel before a court-martial or before any of the appellate agencies concerned with the administration of justice under the Code.<sup>252</sup>

### 2. *Termination and Withdrawal.*

#### a. *The Rule.*

#### Canon 44:

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer.

b. *The Case Law.* Dismissal, separation, or retirement from the service of an appointed counsel automatically relieves him from the court-martial to which he has been appointed, and another counsel must be appointed unless the appointing order already specifies other counsel competent to act in his stead.<sup>253</sup> The termination of an attorney-client relationship does not terminate a defense counsel's duty to abstain from taking any action in the proceedings contrary to the accused's interests. Accordingly, where an accused was represented by one defense counsel at the

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<sup>250</sup> United States v. Slamski, 11 U.S.C.M.A. 74, 28 C.M.R. 298 (1959).

<sup>251</sup> United States v. Miller, 7 U.S.C.M.A. 23, 21 C.M.R. 149 (1956).

<sup>252</sup> MCM, 1951, ¶ 48a; 18 U.S.C. § 203 (1964).

<sup>253</sup> See CM 357972, McCarthy, 7 C.M.R. 329 (1953).

pretrial investigation and by another at the trial, it was prejudicial error for the pretrial defense counsel to prepare, at the suggestion of the staff judge advocate, a memorandum of the expected testimony against the accused, which was forwarded to the convening authority for use by the trial counsel.<sup>254</sup>

The duty of a military defense counsel to advise the accused properly does not end with the trial. Thereafter, if a conviction has resulted, the defense counsel is ethically obligated to give the accused as much information as possible concerning his appellate rights, so that he can make an intelligent decision in regard to counsel and further litigation on appeal. It has been held improper for the defense counsel to advise the defendant what he had to lose and not what he had to gain by appellate defense representation and to say that there was little that appellate defense counsel could do in view of the accused's guilty plea at trial.<sup>255</sup>

Furthermore, with some remote exceptions, it is unethical for an attorney whose relationship with the accused has been terminated to take a position opposed to his former client, even though that position may not actually involve a divulging of attorney-client confidences. Bad faith is not the test of inconsistent advocacy. It is enough to invoke the doctrine of general prejudice that counsel takes any position substantially adverse to an active advocacy of his former client.<sup>256</sup> Accordingly, a former defense counsel sitting as a member of the base prisoner disposition board may not vote against his former client's expressed desire to attend a retraining group.<sup>257</sup> Nor may he conduct a post trial interview of the accused and then recommend approval of the sentence adjudged by the court-martial without suspension of the punitive discharge imposed because he felt that the accused was not fit for rehabilitation, even though the accused desired that the discharge be suspended.<sup>258</sup> Nor may the trial counsel conduct such a post trial interview of the accused.<sup>259</sup> This focuses attention on the next area for consideration : Conflicting Interests.

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<sup>254</sup> *United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955), citing Canons 6 and 37.

<sup>255</sup> *United States v. Darring*, 9 U.S.C.M.A. 651, 26 C.M.R. 431 (1958). *But see United States v. Harrison*, 9 U.S.C.M.A. 731, 26 C.M.R. 511 (1958).

<sup>256</sup> ACM 18593, *Clemens*, 34 C.M.R. 778 (1963), *pet. denied*, 15 U.S.C.M.A. 661, 34 C.M.R. 480 (1964).

<sup>257</sup> *Id.*

<sup>258</sup> ACM 8270, *Bryant*, 16 C.M.R. 747 (1954).

<sup>259</sup> *United States v. Metz*, 16 U.S.C.M.A. 140, 36 C.M.R. 296 (1966).

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### B. *CONFLICTING INTERESTS*

#### 1. *The Rules.*

##### UCMJ article 27(a) :

No person who has acted as investigating officer, law officer, or court member in any case shall act subsequently as trial counsel or, unless expressly requested by the accused, as defense counsel in the same case. No person who has acted for the prosecution shall act subsequently in the same case for the defense, nor shall any person who has acted for the defense act subsequently in the same case for the prosecution.

##### Manual paragraphs 44b, 46b, 6a :

Whenever it appears to the court or to the trial counsel or defense counsel that any member of their respective staffs named in the appointing order is disqualified or unable properly and promptly to perform his duties for any reason including unfitness, misconduct, bias, prejudice, hostility, previous connection with the same case or lack of required legal qualifications, a report of the facts should be made at once to the convening authority for his appropriate action.

##### Manual paragraph 48c :

It is the defense counsel's duty to disclose to the accused any interest he may have in connection with the case and any ground of possible disqualification.

When a defense counsel is designated to defend two or more co-accused in a joint or common trial, he should advise them of any conflicting interests in the conduct of their defense which would in his opinion, warrant a request on the part of any of the accused for other counsel.

##### Canon 6 :

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances in or connection with the controversy, which might influence the client in the selection of counsel. It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

##### Trial Code 5(a) :

Since a trial is by nature an adversary proceeding a trial lawyer cannot represent conflicting interests.

## 2. *The Case Law.*

Some commentators are of the opinion that the exception in Canon 6, permitting the representation of conflicting interests by express consent of all concerned after a full disclosure of the facts, was not meant to apply in criminal cases.<sup>260</sup> Note that the Trial Code flatly prohibits representation of conflicting interests, and the Manual implies that defense counsel should recommend that another counsel be obtained in such circumstances.

One of the fundamental rights of an accused in a criminal prosecution is his right to counsel. The defense counsel must not only be qualified, but he must also represent his client with undivided loyalty.<sup>261</sup> The prohibition against the representation of conflicting interests is so strong that, despite the unquestioned purity of defense counsel's motives, any equivocal conduct on his part must be regarded as being antagonistic to the best interests of his client.<sup>262</sup> The fact that a defense lawyer for the accused in a present case previously acted as defense counsel in a prior case for a government witness now being called against the accused does not automatically justify a conclusion that the present accused is being denied effective legal assistance. But it was error for a defense counsel to represent an accused who pleaded guilty and thereafter to represent a co-accused who pleaded not guilty to the same offense, when the former client became the principal prosecution witness at the trial of the co-accused. In such a situation, the defense counsel was under an affirmative duty to protect both clients when their interests conflicted, and he was placed in a position of divided loyalty detrimentally affecting a constitutional right of the co-accused.<sup>263</sup> Judge Latimer, in his concurring opinion in the cited case,<sup>264</sup> pinpointed the issue as being the delicate question of ascertaining whether counsel violated the Canons of Ethics of the American Bar Association by failing to represent his client with undivided fidelity.

As stated by the Court of Military Appeals, in this type of divided loyalty case counsel finds himself in the legally precar-

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<sup>260</sup> See Sears, *A Re-Evaluation of the Canons of Professional Ethics—A Professor's Viewpoint*, 33 TENN. L. REV. 149 (1966). See also DRINKER 120.

<sup>261</sup> *United States v. Lovett*, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957), citing Canon 6 at 171.

<sup>262</sup> *United States v. McCluskey*, 6 U.S.C.M.A. 545, 550, 20 C.M.R. 261, 266 (1955).

<sup>263</sup> *United States v. Lovett*, 7 U.S.C.M.A. 704, 23 C.M.R. 168 (1957).

<sup>264</sup> 7 U.S.C.M.A. at 708, 23 C.M.R. at 172.



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ious position of having to walk the tightrope between safeguarding the interests of the present accused on one hand and retaining the confidences of his prior client on the other.

Such a rope is too narrow. Such a walk is too long. The possibility of falling is too real. The probability of prejudicing the accused is too great. The basic underlying principle which condemns the representation by an attorney of conflicting interests seeks to achieve as its purpose no more than this—to keep counsel off the tightrope.<sup>265</sup>

The test is not whether counsel could have done more by way of further cross-examination or impeachment of his former client, but whether he did less as a result of his former participation.<sup>266</sup>

The same issue of divided loyalty arises when one defense counsel has been assigned to represent co-accused at a joint trial or trial in common. In the recent case of *United States v. Tackett*,<sup>267</sup> it was held that two accused were denied a fair trial when they were not only tried in common but were represented by a single appointed defense counsel, and the testimony of one accused and the pretrial statement by the other accused, who did not testify, presented defenses which were inconsistent in critical areas. The trial counsel in the *Tackett* case repeatedly invited the court to compare the one accused's testimony with the other's pretrial statement which had been received into evidence, notwithstanding the law officer's instructions that the pretrial statement could only be considered as to the accused who made it. Although trial counsel's improper argument was the precipitating factor in the *Tackett* reversal and the defense counsel had made an unsuccessful pretrial attempt to obtain a severance of the two cases, the defense counsel still had the obligation, when his multiple clients had inconsistent theories of defense, to so advise his clients so that another counsel might be assigned for one of them.<sup>268</sup>

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<sup>265</sup> *United States v. Thornton*, 8 U.S.C.M.A. 57, 59-60, 23 C.M.R. 281, 283-84 (1957).

<sup>266</sup> *Id.* at 285.

<sup>267</sup> 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966).

<sup>268</sup> *But see United States v. Young*, 10 U.S.C.M.A. 97, 27 C.M.R. 171 (1959), where the Court of Military Appeals held, over the dissent of Ferguson, J., that there was no conflict of interest where the defense counsel in an assault with a dangerous weapon case argued that one of the co-accused he represented was guilty only of assault and battery, but said that the defense could not deny that the other accused did the cutting charged. The majority held that the defense counsel was merely acknowledging indisputable evidence in

Similarly, a clear conflict of interest is shown when, during the presentencing procedures after guilty pleas, a defense counsel representing two accused urges that one is more culpable than the other since he had been the leader in the offense, and counsel suggests that the nonleader be given a lighter sentence. Defense counsel representing co-accused cannot sacrifice one for the other.<sup>269</sup>

No conflict of interest is shown, however, if the defense counsel serves the charges on the accused, provided that he does not otherwise participate in the government's case. The mere serving of charges on the accused is clearly an administrative clerical act that does not constitute acting for the government or prosecution. While responsibility for the service of charges is on the trial counsel, his ethical responsibilities require that he go through defense counsel when contacting the accused. It follows that acceptance of service of charges from trial counsel by the defense counsel and his subsequent service of them on his client does not amount to participation on behalf of the prosecution. Further, even if the defense counsel served the charges on the accused prior to his appointment as defense counsel, that act does not constitute a violation of article 27(a) of the Code nor preclude his subsequent assignment as defense counsel.<sup>270</sup>

Decisions barring conflicting representation by trial counsel have also been handed down by the courts. Once an attorney-client relationship has been established with the accused, even inadvertently as a result of general advice concerning the case, the attorney involved cannot later serve as trial counsel at the trial.<sup>271</sup> Also, defense counsel at the original trial cannot serve as the trial counsel at a rehearing<sup>272</sup> or at the trial of a co-accused.<sup>273</sup> Nor may the trial counsel prepare the staff judge advocate's post trial review of the case.<sup>274</sup> Article 6(c) of the Code prohibits persons who act in one capacity in any case from thereafter performing duties in an inconsistent capacity for the

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trying to do his best for both accused and did not want to alienate the court as to the sentence. *See also* ACM 16999, Melton, 30 C.M.R. 796 (1960), *pet. denied*, 12 U.S.C.M.A. 734, 30 C.M.R. 417 (1961).

<sup>269</sup>United States v. Faylor, 9 U.S.C.M.A. 547, 26 C.M.R. 327 (1958).

<sup>270</sup>CM 412123, Roberson, 35 C.M.R. 554 (1965).

<sup>271</sup>ACM 9225, Brownell, 17 C.M.R. 741 (1954).

<sup>272</sup>ACM 5329, Mace, 5 C.M.R. 610 (1952).

<sup>273</sup>*Id.*; ACM 4612, Homan, 6 C.M.R. 504 (1952).

<sup>274</sup>United States v. Hightower, 5 U.S.C.M.A. 385, 18 C.M.R. 9 (1955).

reviewing authority in the same case. The words "same case" are not limited to the specific case against a named accused but extend to proceedings against others for the same or closely related offenses which provide a frame of reference tending to influence his participation in the subsequent review.<sup>275</sup>

However, the accuser is not automatically barred from serving as trial counsel.<sup>276</sup> This duality of function does not reflect the preferred policy, however, and the accuser would be ineligible to so serve if he is in fact biased, prejudiced, or hostile, even though these qualities may derive from his accusation.<sup>277</sup> Trial counsel is not disqualified by reason of the fact that, in his capacity as unit legal officer, he had suggested an investigation of the accused but did not participate therein.<sup>278</sup>

Nor is appointed trial counsel disqualified from serving even though he had previously acted as counsel for the government<sup>279</sup> or legal advisor to the investigating officer at a pretrial investigation,<sup>280</sup> as chief of military justice in the office of the staff judge advocate to the convening authority,<sup>281</sup> or as staff judge advocate of a neighboring command and had advised the pretrial investigating officer.<sup>282</sup>

Paragraph 64 of the Manual provides that a counsel who has an official function to perform requiring him to ascertain the nature of evidence which he is, or will be required, to present to a court-martial, does not fall within the proscription of article 27(a) of the Code, which prohibits a person who has acted as investigating officer from subsequently acting as counsel in the same case. Counsel are thus authorized to conduct their own investigations,<sup>283</sup> interview witnesses,<sup>284</sup> and request other com-

*\*Id.*

<sup>276</sup> *United States v. Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952); *United States v. Smith*, 13 U.S.C.M.A. 553, 33 C.M.R. 85 (1963) (dictum); *United States v. Hayes*, 7 U.S.C.M.A. 477, 22 C.M.R. 267 (1957) (dictum).

<sup>277</sup> *United States v. Lee*, 1 U.S.C.M.A. 212, 2 C.M.R. 118 (1952).

<sup>278</sup> *United States v. Whitacre*, 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961).

<sup>279</sup> *United States v. Weaver*, 13 U.S.C.M.A. 147, 32 C.M.R. 147 (1962).

<sup>280</sup> *United States v. Young*, 13 U.S.C.M.A. 134, 32 C.M.R. 134 (1962). In this case, the Court of Military Appeals stated, at 139, that questions of conflicts of interest are resolved by adherence to the Canons of Ethics.

<sup>281</sup> *United States v. Erb*, 12 U.S.C.M.A. 524, 31 C.M.R. 110 (1961).

<sup>282</sup> *United States v. Hayes*, 7 U.S.C.M.A. 477, 22 C.M.R. 267 (1957).

<sup>283</sup> *United States v. Schreiber*, 5 U.S.C.M.A. 602, 18 C.M.R. 226 (1955). NCM 66-1258, Calvino, 21 February 1967.

<sup>284</sup> *United States v. Patrick*, 8 U.S.C.M.A. 212, 24 C.M.R. 22 (1957); *ACM 18170, Rozema*, 33 C.M.R. 694, 703, *pet. denied*, 14 U.S.C.M.A. 671, 33 C.M.R. 436 (1963).

mands to promptly forward information available regarding the charges.<sup>285</sup>

It is not desirable that the senior legal officer on the staff of the convening authority act as trial counsel, since it is possible that he will be regarded as speaking for the convening authority and, even when it is clear that he speaks only for himself, it is from the vantage point of an official staff position and with special authority. His telling the court members that it is their duty to adjudge a punitive discharge closely approaches unfair argument.<sup>286</sup> In addition, under certain circumstances it could be questionable to appoint the staff judge advocate as trial counsel and one of his subordinates as defense counsel. It is possible that the official relationship between a subordinate and his supervisory superior might adversely affect the freedom of action of the subordinate and seriously circumscribe his professional judgment.<sup>287</sup>

Taking an overall view, it is seen that the question of disqualification of trial counsel due to conflicting representation is centered on the critical inquiry of whether there is a possibility that the accused might be prejudiced by the presence of a personal interest in the outcome of the case on the part of the prosecutor, or the latter's possession of privileged information or an intimate knowledge of the facts by reason of a professional relationship with the accused.

In this area of conflicting interests, the Court of Military Appeals has made its position clear in disapproval of the older, now outmoded, military practice where the trial counsel, defense counsel, law officer, and staff judge advocate

[a]ll happily employed under one roof, perhaps in a single room—not infrequently settled the fate of an accused person, in what was even then considered an adversary proceeding, amid the cozy comforts of an officers' mess. . . . [U]nder the Uniform Code, the filing, investigation and referral of general court-martial charges are parts of no game; neither do they constitute steps in the paternalistic imposition of sanctions for the violation of club rules. Instead, these and related procedures, constitute the elements of that which is a juristic event of substantial

<sup>285</sup> ACM 19131, Grundig, 35 C.M.R. 842, *pet. denied*, 15 U.S.C.M.A. 683, 35 C.M.R. 478 (1965).

<sup>286</sup> CGCM S-21700, Moore, 35 C.M.R. 683 (1964).

<sup>287</sup> See *United States v. Hayes*, 7 U.S.C.M.A. 477, 22 C.M.R. 267 (1957). *But see* CGCM S-21700, Moore, 36 C.M.R. 683 (1964).

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*gravity—one demanding the very highest sort of professional responsibility and conduct from all attorneys involved.*<sup>288</sup> [Emphasis added.]

### C. CONFIDENTIAL COMMUNICATIONS

#### 1. Preservation.

##### a. The Rules.

Manual paragraph 48c :

It is the duty of the defense counsel to represent the accused with undivided fidelity and not to divulge his secrets or confidence.

Canons 37 and 6:

It is the duty of a lawyer to preserve his client's confidences. This duty outlaws the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interests of the client with respect to which confidence has been reposed.

Trial Code 5(b) and 18(a) :

It is the duty of a lawyer to preserve his client's confidences regardless of fear, threat or imposition of punishment and this duty outlasts the lawyer's employment. The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of employment from others in matters adversely affecting any interests of the former client and concerning which he has acquired confidential information, unless he obtains the consent of all concerned.

*b. The Case Law.* It is settled law in the Court of Military Appeals that, since a lawyer is bound by professional duty to

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<sup>288</sup> United States v. Green, 5 U.S.C.M.A. 610, 617, 18 C.M.R. 234, 241 (1955).

avoid divulgence of a client's confidences to the client's disadvantage, doubts concerning equivocal or apparently inconsistent conduct on the part of the counsel must be resolved against him and be regarded as having been antagonistic to the best interests of his client. This rule stands as a rigid, perhaps even a dogmatic, one. It exists not only for the purpose of circumventing the malfeasance of the dishonest practitioner, but also of preventing the upright lawyer from placing himself in a position that requires him to choose between conflicting loyalties. Regardless of the purity of his motives, it is demanded that the lawyer avoid the very appearance of wrongdoing with regard to the privileged relationship. No rule in the ethics of the legal profession is better established nor more rigorously enforced.<sup>289</sup>

The attorney-client privilege is one of the oldest and soundest known to the common law. It exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his counsel, safe from the fear that his confidences will return to haunt him. The rationale for such privilege is to establish that rapport of the counsel with his client which will enable the former to secure all the information essential for him to represent his client adequately.<sup>290</sup>

The recognition of the attorney-client privilege by the Court of Military Appeals is not, to use its term, "juristic sport."<sup>291</sup> It is bottomed on article 27(a) of the Code, which prescribes conflicting representation by counsel, and that mandate is implemented by the Manual, which supports the basic tenet of this present article: that counsel before courts-martial, even if they are not certified lawyers, are subject to the ethics of the legal profession.

**Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge, are attorneys, and the accused is a client, with respect to the client and attorney privilege."**\*

<sup>288</sup> *United States v. McCluskey*, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).

<sup>290</sup> *United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955), citing Canons 6 and 37; *United States v. Marrelli*, 4 U.S.C.M.A. 276, 15 C.M.R. 276 (1954).

<sup>291</sup> *United States v. McCluskey*, 6 U.S.C.M.A. 545, 550, 20 C.M.R. 261, 266 (1955).

<sup>292</sup> MCM, 1951, ¶ 151b(2). See *United States v. Gandy*, 9 U.S.C.M.A. 355, 361 n.2, 26 C.M.R. 135, 141 n.2 (1958), to the same effect.

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The Court of Military Appeals<sup>283</sup> has adopted the Wigmore prerequisites for the establishment of the attorney-client privilege with regard to confidential communications :

- (1) where legal advice of any kind is sought
- (2) from a professional legal advisor in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client,
- (6) are at his instance permanently protected
- (7) from disclosure by himself or by the legal advisor,
- (8) except the protection be waived.<sup>284</sup>

Further, the Court of Military Appeals has adopted the Wigmore view that the attorney-client privilege may not be defeated by an attorney's voluntary divulgence of facts or documents to an opposing party, if that disclosure was beyond his authority, either express or implied, from his client.<sup>285</sup> Although it may be argued that an accused must assume the risk of disloyalty on the part of an attorney whom he accepted to represent him, the Court will not reward perfidious conduct on the part of a faithless counsel.

Loyalty to the court does not merely consist in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation, undisclosed, of the confidences communicated by a client to his attorney in the latter's professional capacity.<sup>286</sup>

Accordingly, it has been held to be a violation of the privilege against disclosure of confidential communications, where an assistant staff judge advocate gave the accused advice relative to his marital problems and then helped to prepare his prosecution

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<sup>283</sup> See *United States v. Marrelli*, 4 U.S.C.M.A. 276, 282, 15 C.M.R. 276, 282 (1954).

<sup>284</sup> VIII WIGMORE, *EVIDENCE* § 2292 (McNaughton rev. 1961) (italics and footnote omitted).

<sup>285</sup> See *United States v. Marrelli*, 4 U.S.C.M.A. 276, 15 C.M.R. 276 (1954).

<sup>286</sup> *OPINIONS*, No. 287 (1953).

for **bigamy**;<sup>297</sup> or where the trial counsel, who had previously advised the accused concerning prior fund shortages, brought this matter out on **cross-examination**.<sup>298</sup> Receipt of a grant of immunity does not waive the **privilege**.<sup>299</sup>

The privilege, of course, does not apply when the attorney-client discussions take place in the presence of a third party who is not the agent of either **party**,<sup>300</sup> where the client gives counsel information to relay to **others**,<sup>301</sup> or as to collateral matters learned by counsel prior to the existence of the attorney-client **relationship**.<sup>302</sup>

## **2. When Disclosure is Proper.**

### **a. The Rules.**

Manual paragraph 151b(2) :

Communications between a client and his attorney are privileged unless such communications clearly contemplate the commission of a **crime**—for instance, perjury or subordination of perjury.

Canon **37** and Trial Code 5(c) :

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

**b. The Case Law.** An attorney may be compelled to testify concerning a cliental confidence received in connection with a projected **crime**.<sup>303</sup> The social interest favoring full disclosure by clients to counsel is inoperative to shield with secrecy confidences made for the purpose of seeking advice as to how best to commit

<sup>297</sup> *United States v. McCluskey*, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).

<sup>298</sup> *United States v. Turkey*, 8 U.S.C.M.A. 262, 24 C.M.R. 72 (1957).

<sup>299</sup> *United States v. Fair*, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953).

<sup>300</sup> *United States v. McCluskey*, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955).

<sup>301</sup> *United States v. Buck*, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958).

<sup>302</sup> *United States v. Gandy*, 9 U.S.C.M.A. 355, 26 C.M.R. 135 (1958).

<sup>303</sup> *See United States v. Marrelli*, 4 U.S.C.M.A. 276, 15 C.M.R. 276 (1954). *See also Noonan, The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1489 (1966).



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a contemplated offense. Similarly, a defense counsel accused by his client of inadequate representation or breach of duty has the right to counter the accusations by revealing matters within the attorney-client relationship.<sup>304</sup>

### D. SUPPORTING A CLIENT'S CAUSE

#### 1. *How Far an Attorney Should Go in Representing His Client.*

##### a. *The Rules.*

Manual paragraphs 48c, 48f:

A person acting as counsel for the accused will perform such duties as usually devolve upon the counsel for a defendant before a civil court in a criminal case. He will guard the interests of the accused by all honorable and legitimate means known to the law.

Defense counsel should endeavor to obtain full knowledge of all facts of the case before advising the accused and he is bound to give the accused his candid opinion of the merits of the case.

Canons 15, 8, and 24:

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyers to assert every such remedy of defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does

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<sup>304</sup>United States v. Allen, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957); ACM 13470, Harris, 24 C.M.R. 698 (1957), *aff'd*, 9 U. S. C.M.A. 493, 26 C.M.R. 273 (1958), citing Canon 37 at 709 of the board of review decision; OPINIONS, NO. 19 (1930).

## ETHICS OF ADVOCATES

it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance.

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing cross interrogations and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

### Trial Code 15(a), 18(a), 13:

**A** lawyer should thoroughly investigate and marshal the facts.

It is both the right and duty of a lawyer fully and properly to present his client's cause and to insist on an opportunity to do so. He should vigorously present all proper arguments against rulings he deems erroneous and see to it that a complete and accurate case record is made.

In this regard, he should not be deterred by any fear of judicial displeasure or punishment.

The lawyer, and not the client, has the sole discretion to determine the accommodations to be granted opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights.

**b. The Case Law.** The common denominator applicable to both the trial counsel and defense counsel is that both must use only "fair and honorable means" at the trial of criminal cases. The ethical obligation of the trial counsel differs from that of the defense counsel in only one material respect: It is the duty of the trial counsel to disclose information in his possession which may be of assistance to the **defendant**.<sup>305</sup> This is where the difference in partisanship is most telling. The trial counsel cannot knowingly permit the innocent to be convicted; he cannot suppress

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<sup>305</sup> See Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 AM. CRIM. L.Q. 23 (1966); Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICA. L. REV. 1493 (1966).

evidence<sup>306</sup> or knowingly misrepresent the nature of evidence before the court.<sup>307</sup> But the defense counsel has no duty to produce evidence helpful to the prosecution, and the ethics of the profession require that he do all in his power within the framework of ethical representation to get his client acquitted. However, neither the presumption of the defendant's innocence nor the government's high burden of proof beyond a reasonable doubt warrants the defense counsel to act with anything other than honor and fairness. The defense counsel is under an obligation to defend his client with all his skill and energy, but he also has moral and ethical obligations to the court embodied in the Canons of Ethics of his profession. His obligation is to achieve a fair trial, not to see that his client is acquitted regardless of the merits.<sup>308</sup> It is as unjust to acquit the guilty through improper means, as it is to use such means to convict the innocent.<sup>309</sup>

The outer limits are clear. On the one hand, the advocate may not lie on behalf of his client. He may refuse to answer, based on the attorney-client privilege, but he cannot lie<sup>310</sup> or permit his witness to paint a false picture in extenuation and mitigation.<sup>311</sup> The other end of the scale is just as clear. Defense counsel should not call the court's attention to prior convictions of the accused which are unknown to the court but would serve to increase the permissible punishment against the accused.<sup>312</sup>

In effect, the objective of safe-guarding the defendant's rights cuts across and limits the truth-discovering purpose of a criminal court-martial. Accordingly, it is ethically proper for the defense counsel to refrain from disclosing to the court factual data against his client, but he may not withhold information concerning the applicable law. The issue arises frequently in both criminal and civil cases. The dean of contract law in the United States, Samuel Williston, learned of a fact extremely damaging to his client's cause during a civil case. When the judge rendered his opinion in

<sup>306</sup> *Giles v. Maryland*, 386 U.S. 66 (1967).

<sup>307</sup> *Miller v. Pate*, 386 U.S. 1 (1967).

<sup>308</sup> See *Mitchell v. United States*, 259 F.2d 787, 792 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

<sup>309</sup> See Bress, *supra* note 305.

<sup>310</sup> Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952). But see Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951).

<sup>311</sup> CM 411402, *Stevenson*, 34 C.M.R. 655, pet. denied, 15 U.S.C.M.A. 670, 35 C.M.R. 478 (1964).

<sup>312</sup> ACM S-3923, *Boese*, 6 C.M.R. 608 (1952).

favor of Williston's client, it was obvious that the judge was not aware of the damaging information. Williston remained silent and did not reveal his personal information to the judge. He was convinced that his duty to his client commanded his silence, and so it **did**.<sup>313</sup>

The problem lies in the twilight zone—that indefinite grey area where the question inevitably arises: How far may an advocate ethically go? Three areas of common occurrence present very real and serious considerations with respect to the ethical responsibilities of the advocate :

(1) Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness when it is known he is telling the truth?

(2) Is it proper to put a witness on the stand when it is known he will commit perjury?

(3) Is it proper to give a client legal advice which you have reason to believe will tempt him to commit perjury?

An excellent ethical solution to these problem areas applicable to both civilian and military advocates has been presented by Bress :

Even though defense attorney may know that a government witness is telling the truth, it is nevertheless entirely proper for him to cross-examine for the purpose of showing the limited weight to be given to the testimony of that witness. The justification for this is that the defendant is entitled to have the government prove its case beyond a reasonable doubt, notwithstanding the defense attorney's **own** belief of his client's guilt. There is nothing inconsistent between that situation, putting the government to its proof, and the high obligation owed by defense counsel to the court. But it is an entirely different matter for defense counsel to present evidence known by him to be false. The defense attorney must always be in charge of his case, and though he may consult with the defendant, the running of the case must be controlled by counsel. Under no circumstances should such consultation between attorney and client result in the production of any witness who will give perjured testimony. Nor should defense counsel permit his **own** client, the defendant, to perjure himself. He should vigorously try to dissuade his client from such action and if the client insists upon testifying falsely, he should move to withdraw from the case without revealing any confidences received from the client. If withdrawal is not permitted, then the defense counsel should limit his examination of the defendant who will give the perjured testimony to the simple question:

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<sup>313</sup> S. WILLISTON, *LIFE AND LAW* 271 (1940).

"You have a statement to make to the court and jury—will you now make it." And he should not argue the truth of that statement in his argument to the jury, because to do so would be a fraud upon the court. He may, nevertheless, argue the case on the sufficiency of the government's testimony and the other evidence offered by the defense, exclusive of the defendant's own perjured testimony.<sup>314</sup>

In addition, a defense counsel should not "frame" a factual defense in any case and should not plant the seeds of falsehood in the mind of his client.<sup>315</sup>

Defense counsel can ethically insist that character witnesses be called to appear at the trial despite the government's offer to stipulate the testimony<sup>316</sup> and may insist that both he and the accused be present at the taking of a deposition despite the distance and expense involved.<sup>317</sup>

The defense counsel has the responsibility to see that the rights of the accused are fully protected at all times and to present all pertinent evidence readily available.<sup>318</sup> However, having once received expert opinion that the accused was legally sane, the defense counsel is not obligated to "shop" for psychiatric evidence in an attempt to find a psychiatrist who would testify that the accused was of an unsound mind.<sup>319</sup>

## 2. Counsel as a Witness.

### a. The Rules.

#### Canon 19:

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

#### Trial Code 11:

When a lawyer knows, prior to trial, that he will be a necessary witness, other than as to merely formal matters such as identification or custody

<sup>314</sup> Bress, *supra* note 305, at 24. *Contra*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

<sup>315</sup> *Johns v. Smyth*, 176 F. Supp. 949 (E.D. Va. 1959).

<sup>316</sup> *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964).

<sup>317</sup> *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

<sup>318</sup> *See United States v. McFarlane*, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957).

<sup>319</sup> *United States v. Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966).

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of a document or the like, he should not conduct the trial. If, during the trial, he discovers that the ends of justice require his testimony, he should, from that point on, if feasible and not prejudicial to his client's case, leave further conduct of the trial to other counsel. If circumstances do not permit withdrawal from the conduct of the trial, a lawyer should not argue the credibility of his own testimony.

*b. The Case Law.* The fact that a person is counsel for one of the parties in a criminal cases does not disqualify him from being called as a witness for either side. He is competent to testify as to any competent or relevant facts except those which have come to his knowledge from confidential communications with his client.<sup>320</sup>

However, for ethical reasons the practice is highly undesirable and looked upon with complete disfavor by the Court of Military Appeals. Unless his testimony involves purely formal matters that are essential to the ends of justice, testimony by a lawyer for his client is improper under Canon 19 because it unfairly throws his credibility as an officer of the court into the balance.<sup>321</sup> The function of an advocate and a witness should be disassociated. The court members naturally give the evidence related by counsel from the stand far greater weight than that of the ordinary witness.<sup>322</sup>

Accordingly, although counsel is competent to take the stand to establish a chain of custody as to an item of physical evidence which had been delivered to him, better practice dictates that counsel should foresee the ethical problem and arrange for some other person to receive the item and act as custodian.<sup>323</sup>

### 3. Interviewing Witnesses.

#### *a. The Rules.*

#### UCMJ article 46:

The trial counsel, defense counsel and the court-martial shall have equal opportunity to obtain witnesses.

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<sup>320</sup> United States v. McCants, 10 U.S.C.M.A. 346, 27 C.M.R. 420 (1959) (reversed on other grounds); United States v. Buck, 9 U.S.C.M.A. 290, 26 C.M.R. 70 (1958).

<sup>321</sup> United States v. Lewis, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966); United States v. Stone, 13 U.S.C.M.A. 52, 32 C.M.R. 52 (1962).

<sup>322</sup> Robinson v. United States, 32 F.2d 505 (8th Cir. 1928).

<sup>323</sup> United States v. Whitacre, 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961).

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Manual paragraphs 42c, 48g :

Counsel may properly interview any witness or prospective witness for the opposing side (except the accused) in any case without the consent of opposing counsel or the accused. In interviewing a witness, counsel should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth when appearing as a witness at the trial.

Ample opportunity will be given the accused and his counsel to prepare the defense, including opportunities to interview each other and any other person.

Canon 39:

A lawyer may properly interview any witness or prospective witness for the opposing side in any criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand.

Trial Code 15(a) :

The lawyer may properly interview any witness or prospective witness for the opposing side except the accused in any criminal action without the consent of the opposing counsel or party for a witness does not "belong" to any party. He should avoid any suggestion calculated to induce any witness to suppress evidence or deviate from the truth. He should avoid taking any action calculated to secrete a witness. However, except when legally required, it is not his duty to disclose any evidence or the identity of any witness.

*b. The Case Law.* May an attorney or other person ethically advise a prospective court-martial witness, who is not his client but who may have an inculpatory relationship to the case, to claim his rights under article 31 and refuse to testify? The answer in the 9th Circuit is that such action is a crime if a corrupt motive is involved, and this author submits that the ethical answer should be "no" in court-martial practice as to attorneys who seek to silence witnesses against their clients. In *Cole v. United States*<sup>324</sup> a nonlawyer defendant was convicted under 18 U.S.C. § 1503 (1964) of obstructing the due administration of justice by attempting to persuade a witness not to testify before a federal

<sup>324</sup> 329 F.2d 437 (9th Cir.), *cert. denied*, 377 U.S. 954 (1964). *Contra*, *Herron v. United States*, 28 F.2d 122 (N.D. Cal. 1928).

grand jury. The defendant claimed that he merely induced the witness to claim his constitutional privilege. On appeal, the circuit court held that the lawfulness of the act of the witness did not wipe out the criminality of the defendant's inducement which was prompted by a corrupt motive to protect himself. The privilege belongs to the witness who has a right to claim it, but another may not obstruct the administration of justice by wrongfully urging the witness to claim it.

The same rationale should apply to attorneys before courts-martial. The attorney has the right to advise only those who are his clients to invoke the privileges of article 31—no other. The *Cole* case stands as good law and a possible warning to over-zealous advocates who would suppress evidence.

Directly contrary to the above views stand Informal Opinions Nos. C-498 (1962) and 575 (1962) of the American Bar Association Committee on Professional Ethics, which held that it is not unethical for a civilian defense counsel in a military general court-martial case to admonish a witness for the prosecution, who was a collateral actor in the offense, that his testimony, sought to be elicited by the prosecution against the counsel's client, might tend to incriminate him. No. 575 was an amplification of No. C-498 and held that the action approved in the earlier opinion would not establish an attorney-client relationship, that such action did not violate the spirit of Canons 15, 22, and 39, and that such warning was not in the sole province of the law officer during trial or in the province of trial counsel prior to trial.

In the opinion of this author, the informal opinions cited above do not reflect the correct ethical principle. What is worse, they hedge. The original question postulated in Informal Opinion No. C-498 was whether the defense counsel would be authorized to advise the witness for the prosecution that, if he desired, he could refuse to testify against the defense counsel's client on the ground that the testimony may tend to incriminate him. The decision did not answer that question when it held that counsel could tell the witness that the testimony sought by the prosecution may tend to incriminate him.

This issue was raised again in Informal Opinion No. 575, when the person questioning the Committee asked point blank :

Does Informal Opinion 498 mean that the defense attorney may, in situations where proper to do so, warn a prosecution witness that he need not testify at all in the criminal action, or does it mean that the



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witness may properly be warned only that he need not testify as to those matters which may tend to incriminate him? The former would not seem to be the law.

In answer the Committee replied:

Opinion C-498 is to the effect only, that in situations where proper to do so, the defense lawyer may warn a witness for the prosecution that his testimony sought to be elicited may tend to incriminate him.

This author submits: (1) the Committee's reply did not answer the specific questions raised; (2) the Committee is now holding, sub silentio, that it is unethical to warn a prosecution witness that he need not testify at all in the criminal action, which is the correct proposition of law as demonstrated by the *Cole* case; (3) the defense counsel has no authority to advise the witness that testimony sought to be elicited by the other side may tend to incriminate him, because prior to the pretrial investigation that counsel can only predict, without actually knowing, what the prosecution will ask the witness and is only gratuitously speculating whether the hypothetical questions he formulates may tend to incriminate the witness; further, if the witness relates to the defense attorney what preparatory questions the trial counsel has asked him, and the defense counsel then advises him that the testimony sought to be elicited may tend to incriminate him, an attorney-client relationship is in fact being established; and, at the pretrial investigation and trial itself, if incriminating questions are asked of the witness while on the stand, the right to refuse to answer is personal to the witness and the defense counsel has no authority to object to the question; (4) the Committee decision in question should be narrowly limited to the effect that the defense lawyer may warn a witness for the prosecution that the answers to certain questions that the *defense* lawyer intends to ask him on cross-examination may be incriminating, if such be the case; (5) defense counsel's duty to *his* client does not permit him to obstruct justice by advising another not his client to suppress his testimony, even though that other has a legal right to do so; and (6) the informal decisions in question should be withdrawn.

The Court of Military Appeals has not yet decided this issue. Judge Latimer, in his dissent in *United States v. Grzegorzcyk*,<sup>325</sup> recognized the issue and mentioned that the defense counsel in

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<sup>325</sup> 8 U.S.C.M.A. 571, 572, 25 C.M.R. 75, 76 (1958).

that case went far beyond the limits of ordinary representation by repeated suggestions, in open court to witnesses whom he had represented at earlier trials for the same offense, that they wrap themselves in the mantle of the article 31 privilege against self-incrimination. Apparently appellate review had not yet been completed on the witnesses' trials. Judge Latimer noted, with apparent approval, that the law officer ruled that the defense counsel could not exercise the privilege for the witness. The decision assumes that the defense counsel also advised the witnesses to claim their privilege during a court recess, but this action was not improper because the defense counsel had previously represented the witnesses and an attorney-client relationship existed.

As to the accused himself, however, the defense counsel may ethically advise him to talk to a defense psychiatrist and then to invoke his right under article 31 of the Code and refuse to talk to a government psychiatrist, even though the practical result is that the only available expert witness at the trial will be the defense expert.<sup>326</sup>

Modern trial practice emphasizes pretrial disclosure of the probable facts. In military practice, the names and addresses of government witnesses must be endorsed on the charge sheet and a copy thereof given to the accused.<sup>327</sup> No similar obligations are imposed upon the accused as to his prospective witnesses ; nor is he required to disclose in advance of trial whether he intends to rely upon an affirmative defense such as alibi or insanity.<sup>328</sup> Moreover, the defense counsel may insist on a private interview, if the witness is willing to grant one. Therefore, in the light of the Code and Manual provisions regarding equality of access to witnesses, it has been held that it is beyond the authority of an agent of the United States Government to interpose himself between a witness and an interviewing counsel by requiring, as a condition for the granting of such interviews, that a designated third party be present.<sup>329</sup> Nor may the government order an accused or his counsel not to communicate with witnesses against

<sup>326</sup> See *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

<sup>327</sup> See MCM, 1951, ¶¶ 29, 44h, app. 5. See also dissent of Quinn, C.J., in *United States v. Enloe*, 15 U.S.C.M.A. 256, 35 C.M.R. 228 at 238 (1965).

<sup>328</sup> See dissent of Quinn, C.J., in *United States v. Enloe*, 15 U.S.C.M.A. 256, 266, 35 C.M.R. 228, 238 (1966).

<sup>329</sup> *United States v. Enloe*, 15 U.S.C.M.A. 256, 35 C.M.R. 228 (1965).

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him, even though those witnesses complain that the accused was bothering them;<sup>330</sup> nor may a law officer preclude defense interviews with prosecution witnesses who have already testified at the trial.<sup>331</sup> As to a witness who is a defendant in a related criminal case, however, trial counsel must go through that witness' defense counsel before questioning him.<sup>332</sup>

Witnesses are not parties and should not be partisans. They do not belong to either side of the controversy. They may be summoned by one or the other or both, but they are not retained by either.<sup>333</sup>

Information as to the probable testimony of a witness may be gleaned from a number of sources, but the most direct and generally reliable source is the witness himself. Every experienced trial lawyer knows that sound cross-examination rests upon the bedrock of pretrial preparation. While it may be unnecessary in some cases, and economically or physically impossible in others, effective preparation for trial includes the interviewing of all prospective witnesses, whether denominated government, defense, or nonparty.<sup>334</sup> There is no ethical requirement that counsel interviewing a witness inform that witness which side he represents, unless the witness asks.<sup>335</sup>

However, although a witness may be compelled to submit to interrogation of counsel in the taking of a deposition or in examination at the trial itself, neither counsel nor the court has the authority to compel a witness to submit to an out-of-court interview by the accused or either counsel. Instead, witnesses may at their personal election refuse to discuss their prospective testimony with anyone, whether it be a law enforcement agent, trial or defense counsel, or the accused, except when summoned in proper form before an officer or a tribunal empowered by law to require him to testify.<sup>336</sup> Although counsel may advise a wit-

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<sup>330</sup> See *United States v. Aycock*, 15 U.S.C.M.A. 158, 35 C.M.R. 130 (1964). See also *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958); *United States v. DeLauder*, 8 U.S.C.M.A. 656, 25 C.M.R. 160 (1958).

<sup>331</sup> *United States v. Strong*, 16 U.S.C.M.A. 43, 36 C.M.R. 199 (1966).

<sup>332</sup> Informal Decision No. 249, ABA OPINIONS 640 (1957).

<sup>333</sup> See *United States v. Enloe*, 15 U.S.C.M.A. 256, 35 C.M.R. 228 (1965).

<sup>334</sup> See dissent of Quinn, C.J., in *United States v. Enloe*, 15 U.S.C.M.A. 256, 35 C.M.R. 228, 237 (1965).

<sup>335</sup> INFORMAL OPINIONS, No. 581 (1962).

<sup>336</sup> See *United States v. Enloe*, 15 U.S.C.M.A. 256, 263, 35 C.M.R. 228, 235 (1965); ACM 8768, Doyle, 17 C.M.R. 615, 640, *pet. denied*, 5 U.S.C.M.A. 840, 17 C.M.R. 381 (1954).

ness as to his legal rights concerning interview by the opposing attorney, counsel should not attempt to influence the election of the witness on the matter either **way**.<sup>337</sup>

In interviewing witnesses or prospective witnesses, counsel must scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth in any degree or to affect his free and untrammelled conduct when appearing at the trial. Intimidating or influencing a witness may give rise to charges under article 134 of the Code.<sup>338</sup> On the other hand, advising or instructing a prospective witness concerning the procedures of a trial, his expected demeanor thereat, or probable cross-examination is not improper, so long as no attempt is made to influence the witness to tell other than the whole **truth**.<sup>339</sup>

As a matter of fact, it is recommended that a prospective witness be told by the counsel calling him that if he is asked whether he has talked with anyone concerning his expected testimony prior to trial, he is to answer honestly to this question as well as to all other questions. Some witnesses, otherwise completely truthful, have a tendency to deny having gone over their testimony with anyone prior to trial. It may result from a mistaken idea that it is wrong to discuss his testimony with one of the attorneys prior to trial.<sup>340</sup> If a cross-examining counsel belligerently inquires as to what counsel calling a witness told him to say on the stand, experienced witnesses frequently deflate his sails by replying, "Counsel told me to tell the truth, the whole truth, and nothing but the truth."

## 4. *Restraining Client From Improprieties.*

### a. *The Rules.*

Canon 16:

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to

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<sup>337</sup> ACM 8768, Doyle, 17 C.M.R. 615, 641, *pet. denied*, 5 U.S.C.M.A. 840, 17 C.M.R. 381 (1954).

<sup>338</sup> ACM 7414, Rossi, 13 C.M.R. 896 (1953).

<sup>339</sup> *Cf.* United States v. Slozes, 1 U.S.C.M.A. 47, 1 C.M.R. 47 (1951); NCM 281, Dorsett, 14 C.M.R. 475 (1953).

<sup>340</sup> AMERICAN LAW STUDENT ASSOCIATION, LAWYERS' PROBLEMS OF CONSCIENCE 57 (1953); DRINKER 86.

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do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

### Canon 29:

The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

### Trial Code 10(d) :

Subject to whatever qualifications may exist by virtue of the confidential privilege that exists between a lawyer and his client, the lawyer should expose without fear before the proper tribunals perjury and any other unethical or dishonest conduct.

*b. The Case Law.* The case of the perjured client or witness: What does the ethical advocate do? Neither trial<sup>341</sup> nor defense counsel may ever, under any circumstances, knowingly present false testimony or false documents or otherwise participate in a fraud upon the court. This is a rule which is so basic and fundamental to the integrity of our military system of justice and the legal profession that it can never admit of any exception, under any circumstances.<sup>342</sup>

Occasionally, some naive and inexperienced person lacking adequate training in his profession may challenge this fundamental rule. It takes only a moment's consideration by a mature mind to realize that this is a perversion and prostitution of an honorable profession. If perjury is a permissible tool for a defense counsel, can we say that it should be denied to the prosecution? . . . [T]he lawyer is simultaneously an agent of his client and an officer of the court and he promises to conduct himself not only in accordance with the law, as do all other citizens, but uprightly as well. Uprightly obviously means ethically. Properly understood, the duties of a lawyer to the court can never be in conflict with his duty to his client.<sup>343</sup>

Yet the question remains: What does defense counsel do if the accused insists on exercising his right to testify in his own

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<sup>341</sup> *Napue* v. Illinois, 360 U.S. 264 (1959); *Alcorta* v. Texas, 355 U.S. 28 (1957); *Mooney* v. Holohan, 294 U.S. 103 (1935).

<sup>342</sup> Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 12 (1966).

<sup>343</sup> *Id.*

behalf and then commits perjury? Even if he has forewarning of his client's intent, counsel cannot physically bar him from taking the stand. Conscientious counsel would, however, have reminded his client that perjury is illegal and might result in his being later prosecuted for that offense, if he is not acquitted of the present offense, and that an announced intention to commit perjury destroys the attorney-client **privilege**.<sup>344</sup>

Counsel's consternation at perjured testimony by his client is understandable. If he fails to reveal the same, even in the criminal case, he violates his ethical **obligations**,<sup>345</sup> and his silence might also be misconstrued as an approval of the deception. However, the form of his response to the situation is the critical issue. What he may not do is clear: He may not brand the accused a liar in open court and then and there request to be relieved from the case. An attorney cannot pursue a course of conduct that clashes with his obligation to represent his client to the best of his **ability**.<sup>346</sup> The ethical solution is to make the disclosure to the law officer in an out-of-court **hearing**.<sup>347</sup>

## *5. Defense of One Known to be Guilty.*

### *a. The Rules.*

UCMJ article 51(c) (1):

The accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt.

Manual paragraph 48c :

It is the defense counsel's duty to undertake the defense regardless of his personal opinion as to the guilt of the accused.

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<sup>344</sup> Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibilities*, 64 MICH. L. REV. 1493, 1496 (1966).

<sup>345</sup> INFORMAL OPINIONS NO. 609 (1962).

<sup>346</sup> *United States v. Winchester*, 12 U.S.C.M.A. 74, 30 C.M.R. 74 (1961), which held that the accused was prejudiced as to the sentence where he pleaded guilty but prior to the findings he testified for a co-accused who had pleaded not guilty and assumed the main blame in an effort to absolve the co-accused. His individual defense counsel then stated in open court that the accused had committed perjury and asked permission to withdraw from the case.

<sup>347</sup> See *id.* But cf. OPINIONS, No. 287 (1953); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966).

### Canon 5:

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

### Trial Code 3:

A lawyer should not decline to undertake the defense of a person accused of crime, regardless of his personal or the communities' opinion as to the guilt of the accused or the unpopularity of the accused's position, because every person accused of a crime has a right to a fair trial, including persons whose conduct, reputation or alleged violations may be the subject of public unpopularity or clamor. This places a duty of service on the legal profession and, even though a lawyer is not bound to accept particular employment, requests for service in criminal cases should not lightly be declined or refused merely on the basis of the lawyer's personal desires, his or public opinion concerning the guilt of the accused, or his repugnance to the crime charged or to the accused.

*b. The Case Law.* The problem of the guilty client is really no ethical problem at all. The question before the American court-martial is not whether the accused be guilty, it is whether he be shown to be guilty by legal proof of an offense legally set forth.<sup>348</sup> It is the right of the most degraded human being in a civilized state to a real hearing in his case in a judicial court, which can be obtained only through honest and competent advocacy.<sup>349</sup>

The fact must be remembered that, under our system of justice, there is a legal presumption that an accused person is innocent until he has been found guilty by the members of the court-martial. The onus is upon the government to establish the guilt of an accused person beyond a reasonable doubt. No man is bound to accuse himself and his advocate must do nothing inconsistent with that fundamental rule.<sup>350</sup>

There is nothing unethical in taking a bad case, defending the guilty, or becoming the advocate for a cause personally not be-

<sup>348</sup> See DRINKER 143 n.25.

<sup>349</sup> NCM S-58-01854, Field, 27 C.M.R. 863, 871 (1958); E. PARRY, THE SEVEN LAMPS OF ADVOCACY 33 (1924).

<sup>350</sup> M. ORKIN, LEGAL ETHICS 110 (1957).

lieved in. It is ethically **neutral**.<sup>351</sup> “In a way the practice of law is like free speech. It defends what we hate as well as what we most love.”<sup>352</sup>

## 6. *Pleas.*

### a. *The Rule.*

Manual paragraph **70a**:

The accused has a legal and moral right to enter a plea of not guilty even if he knows he is guilty. This is so because his plea of not guilty amounts to nothing more than a statement that he stands upon his right to cast upon the prosecution the burden of providing his alleged guilt.

b. *The Case Law.* Unless the accused unequivocally admits that he is guilty of the charges and specifications to which he pleads guilty, defense counsel cannot permit him to enter such a plea, despite the fact that such counsel knows that there is sufficient prosecution evidence to convict his client if he pleads not guilty and that he can obtain the benefit of an extremely favorable pretrial agreement. The Court of Military Appeals has held a petitioner’s plea of guilty to have been improvidently entered where the accused claimed that he had no recollection of the charged offense or of the events surrounding it and that he had signed a pretrial agreement that was untrue on the advice of counsel who believed that he would be returned to duty.<sup>353</sup> An accused’s guilty plea will also be set aside if it is based on the defense counsel’s incorrect concept of the law involved.<sup>354</sup>

When the accused has entered a plea of not guilty, it is improper for defense counsel to thereafter concede away his innocence.<sup>355</sup> Accordingly, it is prejudicially erroneous for the defense counsel to concede in his closing argument that the prosecution had successfully proven the accused’s guilt.<sup>356</sup> Such concessions by coun-

<sup>351</sup> C. CURTIS, **IT’S YOUR LAW** 29 (1954).

<sup>352</sup> *Id.* at 31.

<sup>353</sup> *United States v. Holladay*, 16 U.S.C.M.A. 373, 36 C.M.R. 529 (1966); *United States v. Chancellor*, 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966).

<sup>354</sup> *See United States v. Fernengel*, 11 U.S.C.M.A. 535, 29 C.M.R. 351 (1960).

<sup>355</sup> *United States v. Mitchell*, 16 U.S.C.M.A. 302, 36 C.M.R. 458 (1966); *United States v. Smith*, 8 U.S.C.M.A. 582, 585 n.2, 25 C.M.R. 86, 89 n.2 (1958); *United States v. Walker*, 3 U.S.C.M.A. 355, 359, 12 C.M.R. 111, 115 (1953).

<sup>356</sup> *United States v. Hampton*, 16 U.S.C.M.A. 304, 36 C.M.R. 460 (1966).



sel, in effect, amount to pleading the accused guilty at the close of the case on the merits. At the very least, such improper conduct on the part of counsel demand interrogation of the defendant concerning his agreement to his counsel's trial tactics, as well as an examination by the law officer into the accused's understanding of their meaning and effect as a virtual plea of guilty.<sup>357</sup> Counsel for the accused cannot ethically override his client's desire, expressed in open court, to plead not guilty and covertly enter in the name of that client another plea, whatever the label, which would shut off the accused's right to plead not guilty. Nor in a capital case, where article 45(b) of the Code precludes acceptance of a guilty plea, may defense counsel's tactics effectively inform the court that, had there not been a statutory prohibition, the accused would have judicially confessed to the crime.<sup>358</sup>

The negotiation of a pretrial agreement with the convening authority on behalf of the accused is an authorized procedure which may greatly benefit the accused, but defense counsel should not negotiate such an agreement prior to consulting with the accused.<sup>359</sup>

Counsel's duty to represent the accused does not end with the findings. Remaining for determination is the question of the accused's liberty, property, social standing, and, in effect, his whole future. Negotiation of a favorable pretrial agreement does not transform the trial into an empty ritual, nor does it relieve the defense counsel of his duty to appeal as effectively as possible to the conscience of the court to "beat" the pretrial agreement and obtain a more favorable sentence for his client.<sup>360</sup> The court members should not be made aware of the fact that a pretrial agreement was negotiated or that such a negotiation had been attempted.<sup>361</sup>

Further, assuming that a proper plea of guilty has been entered and accepted, defense counsel must take care that he does not get carried away with his advocate's oratory and make borderline or inconsistent statements, rendering that plea improvident and requiring that the plea be set aside, thus depriving his client of

<sup>357</sup> *United States v. Chancellor*, 16 U.S.C.M.A. 297, 36 C.M.R. 453 (1966).

<sup>358</sup> *United States v. McFarlane*, 8 U.S.C.M.A. 96, 23 C.M.R. 320 (1957).

<sup>359</sup> See concurring opinion of Ferguson, J., in *United States v. Hood*, 9 U.S.C.M.A. 558, 563, 26 C.M.R. 338, 343 (1958).

<sup>360</sup> *United States v. Allen*, 8 U.S.C.M.A. 504, 25 C.M.R. 8 (1957). See *United States v. Welker*, 8 U.S.C.M.A. 647, 25 C.M.R. 151 (1958).

<sup>361</sup> See *United States v. Lewis*, 16 U.S.C.M.A. 145, 36 C.M.R. 301 (1966).

whatever benefits he stood to gain from the plea.<sup>362</sup> Trial counsel also has an obligation in this regard and should not shrug off borderline statements by his adversary as mere puffing. If it appears that a providency issue might be raised by such statements, it is his duty, as the “oracle of the law” at a special court-martial, to advise the president of the procedures to be followed or to request the law officer at a general court-martial to re-inquire if the accused is in truth guilty of the offenses to which he has pleaded guilty and to ensure that he realizes the admissions inherent in his plea and the possible conflict between that plea and the statements later made in court.<sup>363</sup>

### *7. Technical Defenses.*

#### *a. The Rules.*

##### Manual paragraph 48c

The defense counsel will guard the interests of the accused by all honorable and legitimate means known to the law.

#### Canon 5:

Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

#### Trial Code 4(a) :

Having accepted employment in a criminal case, a lawyer’s duty, regardless of his personal opinion as to the guilt of the accused, is to invoke the basic rule that the crime must be proved beyond a reasonable doubt by competent evidence and to raise all valid defenses.

*b. The Case Law.* An attorney has the ethical duty to present to the court all claims and defenses of his client, unless he knows them to be false. Although counsel may advise his client not to raise a certain defense because the facts do not support it, the final decision in the matter rests with accused.<sup>364</sup> Accordingly,

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<sup>362</sup> See *United States v. Hinton*, 8 U.S.C.M.A. 39, 23 C.M.R. 263 (1957); *United States v. Broy*, 14 U.S.C.M.A. 419, 34 C.M.R. 199 (1964).

<sup>363</sup> See ACM S-20943, Croft, 33 C.M.R. 856, 861 (1963).

<sup>364</sup> CM 398074, Oakley, 25 C.M.R. 624 (1958).

counsel is honor bound to raise the issue of involuntariness of a confession or the defense of entrapment, even though in his professional opinion such action would produce no substantially beneficial result<sup>365</sup> or might be frivolous in the extreme.<sup>366</sup>

Counsel must take every advantage that the law provides to protect his client. Reliance on a technical defense, such as the statute of limitations, by counsel on behalf of his client is entirely proper, and astute preparation by counsel may prove highly advantageous to his client. Consider the interplay between the statute of limitations and a desertion prosecution. The limitation for the filing of charges of desertion is three years, but it is only two years for the lesser included offense of absence without leave.<sup>367</sup> Accordingly, the alert attorney, after a not guilty plea of his client to a desertion charge filed after two years of the statute has already run, will vigorously contest the intent required for desertion and will slant his argument toward complete acquittal and also toward the lesser included absence without leave and ensure that the law officer instructs relative thereto. Thereafter, in the event that his client is found guilty of the lesser included offense, he may properly raise the two-year statute of limitations as to absence without leave offenses to bar the entry of that conviction.<sup>368</sup>

However, akin to the good chess player, the alert defense counsel must weigh carefully the long-range consequences of all his tactical moves. In the desertion situation outlined above, he must not get carried away with his plan and permit his client to plead guilty to the lesser included offense of absence without leave, because a knowledgeable plea entered after being fully advised of the consequences can waive the statute of limitations.<sup>369</sup>

## E. ARGUMENTS AND PRESENTENCING PROCEDURES

### 1. *The Rides*.

Manual paragraph 72b :

A reasonable latitude should be allowed counsel in presenting their

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<sup>365</sup> *Id.*

<sup>366</sup> United States v. Horne, 9 U.S.C.M.A. 601, 26 C.M.R. 381 (1958).

<sup>367</sup> UCMJ art. 43.

<sup>368</sup> United States v. Wiedemann, 16 U.S.C.M.A. 365, 36 C.M.R. 521 (1966); United States v. Cooper, 16 U.S.C.M.A. 390, 37 C.M.R. 10 (1966).

<sup>369</sup> United States v. Troxell, 12 U.S.C.M.A. 6, 30 C.M.R. 6 (1960).

arguments. Counsel may make a reasonable comment on the evidence and may draw such inferences from the testimony as will support his theory of the case. The testimony, conduct, motives, and evidence of malice on the part of witnesses may, so far as disclosed by the evidence, be commented upon. It is improper to state in an argument any matter of fact as to which there has been no evidence. A party may, however, argue as though the testimony of his own witnesses conclusively established facts related by them.

The prosecution may not comment upon the failure of the accused to take the witness stand; however, if the accused has testified on the merits with respect to an offense charged, and if he fails in such testimony to deny or explain specific facts of an incriminating nature that the evidence of the prosecution tends to establish with respect to that offense, such failure may be commented upon. When an accused is on trial for a number of offenses and has testified to one or more of them only, no comment can be made on his failure to testify as to the others. Refusal of a witness to answer a proper question may be commented upon.

### Canon 22 and Trial Code 23(b) :

It is not candid or fair for the lawyer knowingly in argument to assert as a fact that which has not been proved, or, in those jurisdictions where a side has the opening and closing arguments, to mislead his opponent by conceding or withholding positions in his opening argument upon which his side then intends to rely.

### Trial Code 20(c)

A lawyer should never misstate the evidence or state as fact any matter not in evidence, but otherwise has the right to argue in the manner he deems effective, provided his argument is mannerly and not inflammatory.

## 2. *The Case Law.*

*a. Argument Before Findings.* After both sides have rested prior to findings, arguments may be made with counsel for the prosecution making the opening argument and, if any argument is made, the defense making the closing argument.<sup>370</sup> While some latitude must be permitted counsel, he is required to confine himself to reasonable comment on the issues, the evidence, whatever fair and reasonable inferences may be drawn therefrom, and to

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<sup>370</sup> MCM, 1951, ¶ 72a.

the arguments of opposing counsel.<sup>371</sup> Subject to these limitations, counsel may with perfect propriety appeal to the court with all the power, force, and persuasiveness which his learning, skill, and experience enable him to command.

Counsel should not cite legal authorities or argue the facts of other cases during argument on the findings or the sentence.<sup>372</sup> However, counsel may refer to the principles of law applicable to the case.<sup>373</sup> Trial counsel may not comment on the exercise by an accused of his rights under article 31(a) and (b) of the Code<sup>374</sup> or on accused's failure to take the witness stand;<sup>375</sup> nor may trial counsel ask the court to consider the probable effect of its findings on relations between the military and civilian communities.<sup>376</sup>

Argument based upon the evidence and reasonable inferences therefrom is not rendered improper by the fact that it may be severely critical or denunciatory of the accused or may incidentally stir the sympathies or arouse the prejudices of the members of the court against him.<sup>377</sup> But it is improper for counsel in his argument to use vituperative and denunciatory language or to appeal or make reference to religious beliefs or other matters, where such language and appeal is calculated only to unduly excite or arouse emotions, passions, and prejudices of the court to the detriment of the accused.<sup>378</sup>

Accordingly, referring to the accused as a "barracks thief of

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<sup>371</sup> United States v. Lyon, 15 U.S.C.M.A. 307, 35 C.M.R. 279 (1965); United States v. Lee, 4 U.S.C.M.A. 571, 16 C.M.R. 145 (1954); ACM 9406, Weller, 18 C.M.R. 473 (1954). See United States v. Beatty, 10 U.S.C.M.A. 311, 27 C.M.R. 385 (1959).

<sup>372</sup> See United States v. Fair, 2 U.S.C.M.A. 521, 10 C.M.R. 19 (1953); United States v. Bouie, 9 U.S.C.M.A. 228, 26 C.M.R. 8 (1958); United States v. Johnson, 9 U.S.C.M.A. 178, 25 C.M.R. 440 (1958).

<sup>373</sup> United States v. Gravitt, 5 U.S.C.M.A. 249, 17 C.M.R. 249 (1954).

<sup>374</sup> United States v. Skees, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959); United States v. Hickman, 10 U.S.C.M.A. 568, 28 C.M.R. 134 (1959).

<sup>375</sup> Griffin v. California, 380 U.S. 609 (1965); United States v. Skees, 10 U.S.C.M.A. 285, 27 C.M.R. 359 (1959). Cf. NCM 65-1445, Blair, 36 C.M.R. 750 (1965), *rev'd on other grounds*, 16 U.S.C.M.A. 257, 36 C.M.R. 413 (1966).

<sup>376</sup> United States v. Cook, 11 U.S.C.M.A. 99, 28 C.M.R. 323 (1959). See United States v. Weaver, 13 U.S.C.M.A. 147, 32 C.M.R. 147 (1962).

<sup>377</sup> United States v. Day, 2 U.S.C.M.A. 416, 9 C.M.R. 46 (1953); United States v. Valencia, 1 U.S.C.M.A. 415, 4 C.M.R. 7 (1952).

<sup>378</sup> ACM 9406, Weller, 18 C.M.R. 473 (1954).

the worst type”<sup>379</sup> or a liar<sup>380</sup> has been held not to be improper when they accurately describe the crime committed and their use finds support in the testimony. But trial counsel’s vilifying an accused and characterizing him as a “liar, rotten character and moral leper” has been held to constitute emotional, inflammatory, misleading, highly improper, and definitely prejudicial argu-

Calling attention to the accused’s presence in the courtroom is not error. But argument of the trial counsel referring to the lack of emotion on the face of the accused during the course of the trial is objectionable, because it interjects nonevidentiary matters into the case which cannot properly be considered by the court members.<sup>382</sup> Comment by trial counsel that he could call more witnesses to substantiate the government’s case also usually constitutes unsworn testimony and is error, but it has been held permissible when used as reply advocacy to rebut defense counsel’s argument imputing bad faith to the trial counsel in charging him with suppressing available testimony.<sup>383</sup>

It is improper for counsel to assert to the court his personal belief as to the guilt or innocence of the accused, and he should not bring to the attention of the court any intimation of the views of the convening authority or those of the staff judge advocate. But it is not improper for him to argue or express his opinion that the accused is guilty where he states, or it is apparent, that such opinion is based solely on the evidence as distinguished from his personal opinion.<sup>384</sup>

If argument of counsel is merely illogical or absurd but not subject to objection as being improper, the appropriate remedy is exposure and answer by his opposing counsel.<sup>385</sup>

*b. Presentencing Argument.* Neither the Code nor the Manual provides for argument of counsel in regard to the sentence. It is, however, entirely proper and appropriate for both trial and de-

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*Id.*

<sup>380</sup> *United States v. Doctor*, 7 U.S.C.M.A. 126, 21 C.M.R. 252 (1956). But *cf.* ACM 7395, Westergren, 14 C.M.R. 560 (1953).

<sup>381</sup> NCM 252, Douglas, 13 C.M.R. 529 (1953).

<sup>382</sup> *United States v. Hurt*, 9 U.S.C.M.A. 735, 27 C.M.R. 3, 50 (1958).

<sup>383</sup> *United States v. Anderson*, 12 U.S.C.M.A. 223, 30 C.M.R. 223 (1961). See *United States v. Tackett*, 16 U.S.C.M.A. 226, 36 C.M.R. 382 (1966).

<sup>384</sup> ACM 9406, Weller, 18 C.M.R. 473 (1954); MCM, 1951, ¶¶44g, 48c.

<sup>385</sup> *United States v. Hurt*, 9 U.S.C.M.A. 735, 27 C.M.R. 3, 49 (1958).

fense counsel to argue on the quantum of punishment that should be adjudged after the introduction of all evidence relating to the sentence.<sup>386</sup> Indeed, it has been held prejudicial to the accused if his defense counsel does not present evidence in extenuation and mitigation and argue as to the sentence.<sup>387</sup>

In general, the principles governing arguments of counsel before findings are equally applicable to arguments in the presentencing procedure. After each side has introduced any appropriate C.M.R. 478 (1965). *Contra*, U.S. DEP'T OF ARMY, PAMPHLET NO. 27-9, THE matter that may have bearing on the sentence, trial counsel has the right to make an opening argument on the quantum of punishment and, if any is made on behalf of the defense, the closing argument.<sup>388</sup> But the arguments of both counsel are required to be confined to the facts adduced during the presentencing procedure, the evidence in the case and the reasonable deductions therefrom insofar as it affects the sentence, and to the arguments of the opposing counsel, and they may not go beyond the bounds of fair argument.<sup>389</sup> Neither can include matter not supported by the facts, or which the court is not justified in considering in determining the sentence. The fact that the accused failed to testify, either on the general issue or in extenuation or mitigation, may not be mentioned.<sup>390</sup>

It is improper for trial counsel to contend that the convening authority has already considered clemency factors and reduced the accused's punishment by directing trial by a special court-martial<sup>391</sup> or to refer to possible ameliorative action by the board of correction for military records.<sup>392</sup> It is also improper to argue LAW OFFICER para. 88 (2d ed. 1958); U.S. DEP'T OF ARMY, PAMPHLET NO. 27- for the maximum sentence and then suggest that military correctional and penal systems would then provide the accused needed psychiatric care, because such argument can be equated to an

<sup>386</sup> *United States v. Olson*, 7 U.S.C.M.A. 242, 22 C.M.R. 32 (1956).

<sup>387</sup> See *United States v. Wimberley*, 16 U.S.C.M.A. 3, 36 C.M.R. 159 (1966); *United States v. McMahon*, 6 U.S.C.M.A. 709, 21 C.M.R. 31 (1956).

<sup>388</sup> CM 412244, Wilson, 35 C.M.R. 576, pet. denied, 15 U.S.C.M.A. 683, 35 C.M.R. 478 (1965). *Contra*, U.S. DEP'T OF ARMY, PAMPHLET NO. 27-9, THE LAW OFFICER para 88 (2d ed. 1958); U.S. DEP'T OF ARMY, PAMPHLET NO. 27-173, MILITARY JUSTICE-TRIAL PROCEDURE 229 (1964).

<sup>389</sup> *United States v. Olson*, 7 U.S.C.M.A. 242, 22 C.M.R. 32 (1956).

<sup>390</sup> ACM 9406, Weller, 18 C.M.R. 473 (1954).

<sup>391</sup> *United States v. Crutcher*, 11 U.S.C.M.A. 483, 29 C.M.R. 299 (1960); *United States v. Carpenter*, 11 U.S.C.M.A. 418, 29 C.M.R. 234 (1960).

<sup>392</sup> *United States v. Simpson*, 10 U.S.C.M.A. 229, 27 C.M.R. 303 (1959).

invocation of the condemned practice of adjudging a harsh sentence in reliance on mitigating action by higher authority.<sup>393</sup>

Trial counsel may not in his presentencing argument purport to speak for the convening authority,<sup>394</sup> nor refer to the convening authority's views,<sup>395</sup> nor refer to any departmental policy directives with regard to sentencing matters.<sup>396</sup> Counsel are also precluded from making reference to any punishment or quantum of punishment in excess of that which can be lawfully imposed in the particular case by the present court.<sup>397</sup>

It has been held that the admissibility as evidence in mitigation and extenuation of a document indicating that the victim of the alleged offense did not desire the accused to be punished further was within the sound discretion of the law officer, and his refusal to admit such a document did not constitute error.<sup>398</sup>

Lastly, there is the problem of the BCD striker—the accused who wants a punitive discharge as his passport out of the service. It is clear that, while trial counsel can argue for a specific sentence and type of punitive discharge, it is improper for defense counsel to acknowledge that a punitive discharge is appropriate when the accused has asked to be retained in service.<sup>399</sup> But what are the defense counsel's ethical obligations when the accused does not wish to be retained and even takes the witness stand to express his desires? A Navy board of review<sup>400</sup> has indicated that the defense counsel must not assist the accused in this endeavor by

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<sup>393</sup> CM 411337, Jones, 34 C.M.R. 642 (1964); CM 411402, Stevenson, 34 C.M.R. 655 (1964).

<sup>394</sup> United States v. Lackey, 8 U.S.C.M.A. 718, 25 C.M.R. 222 (1958).

<sup>395</sup> United States v. Carpenter, 11 U.S.C.M.A. 418, 29 C.M.R. 234 (1960). Paragraph 44g(1) of the Manual provides that the trial counsel will not bring to the attention of the court any intimation of the views of the convening authority, or those of the staff judge advocate or legal officer, with respect to the guilt or innocence of the accused, appropriate sentence, or concerning any other matter exclusively within the discretion of the court. See UCMJ art. 37.

<sup>396</sup> United States v. Fowle, 7 U.S.C.M.A. 349, 22 C.M.R. 139 (1956).

<sup>397</sup> United States v. Whitacre, 12 U.S.C.M.A. 345, 30 C.M.R. 345 (1961); United States v. Crutcher, 11 U.S.C.M.A. 483, 29 C.M.R. 299 (1960). As to rehearings, see United States v. Eschmann, 11 U.S.C.M.A. 64, 28 C.M.R. 288 (1959), holding that the law officer's instructions on a rehearing should state only the maximum sentence awarded (or approved) at the first trial and should not state any higher maximum which the Manual's table of maximum punishment might list for the offense.

<sup>398</sup> United States v. Ault, 15 U.S.C.M.A. 540, 36 C.M.R. 38 (1965).

<sup>399</sup> United States v. Mitchell, 16 U.S.C.M.A. 302, 36 C.M.R. 458 (1966).

<sup>400</sup> NCM S-65-1378, Hoffman, 4 October 1965.



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posing appropriate questions to the accused while he is on the stand or subsequently arguing for the imposition of such a discharge. Defense counsel bears the responsibility to attempt to dissuade his client from this course of action and, even if the client persists, counsel may not aid him. The special ethical code which governs the advocate who acts for another has long discredited the "alter ego" theory which would ascribe no individual responsibility to counsel for the actions he takes under the guise that he is only doing his client's bidding.

### V. DUTY TO FELLOW ATTORNEYS

The highest reward that can come to a lawyer is the esteem of his professional brethren. Chief Justice Hughes, 13 *Proceedings of the American Law Institute* 61-62 (1936).

And do as adversaries do in law, Strive mightily, but eat and drink *as* friends. Shakespeare, *The Taming of the Shrew* (act 1, scene 2, line 281).

#### A. RELATIONS WITH OTHER ATTORNEYS

##### 1. *Ill Feelings and Personalities.*

###### *a. The Rules.*

##### Manual paragraph 42b:

In performing their duties before courts-martial, counsel should maintain a courteous and respectful attitude toward the opposing counsel. Personal colloquies between counsel which cause delay or promote unseemly wrangling should be carefully avoided. The conduct of counsel with each other should be characterized by candor and fairness.

##### Canon 17:

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling must be carefully avoided.

Trial Code 14(b) and 20(i) :

A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel, and should remain wholly uninfluenced by any ill feeling between the respective clients.

A lawyer should not engage in acrimonious conversations or exchanges involving personalities with opposing counsel, but should address his objections, requests and observations to the court.

*b. The Case Law.* All professions stress the importance of cordial relations among their members.<sup>401</sup> The continuing furtherance of the legal profession depends, in part, upon a fraternal sense of goodwill and mutual confidence among the individuals who practice it. Goodwill and mutual confidence are strengthened by adherence to ethical standards and by the observation of professional etiquette and courtesy. Failure to adhere to the cited standards will subject offending counsel to possible contempt or suspension proceedings and probable criticism from appellate tribunals. Everyone aspires to see his name or deeds in print, but somehow one gets the feeling that it would be preferable if the citation was commendatory.

When a trial counsel implies that the defense counsel has fabricated the defense for his client, that trial counsel has the duty to produce hard evidence, not mere insinuations or veiled references to the fact that a shrewd defense counsel can prompt an accused to "remember" facts bolstering an alleged defense.<sup>402</sup>

Common courtesy and customs of the bar require that counsel permit his adversary to complete a statement without being interrupted. "Similarly, it is a breach of customary courtroom etiquette to interrupt opposing counsel during his argument to the court, unless that argument prejudicially exceeds the bounds of fair comment. The personal differences between opposing counsel cannot be allowed to precipitate an acrimonious verbal exchange between themselves. As has been appropriately noted, the reporter can only take down the remarks of one person at a time.<sup>404</sup> Remarks by defense counsel, when asked for a page number by his adversary, such as: "No, you haven't shown me any courtesy,

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<sup>401</sup> CAREY & DOHERTY, *ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION* 147 (1966).

<sup>402</sup> *United States v. Allen*, 11 U.S.C.M.A. 539, 29 C.M.R. 355 (1960).

<sup>403</sup> *United States v. Oakley*, 11 U.S.C.M.A. 529, 29 C.M.R. 345 (1960). See *United States v. Bigelow*, 11 U.S.C.M.A. 529, 29 C.M.R. 343 (1960).

<sup>404</sup> *United States v. Hodges*, 14 U.S.C.M.A. 33 C.M.R. 235 (1963).

why should I show you any?" are unprofessional and as a practical matter do nothing to further his client's cause in the eyes of the court.<sup>405</sup>

The classic case in this area is *United States v. Lewis*.<sup>406</sup> There, the conduct of both the trial counsel and the defense counsel, coupled with the failure of the law officer to keep counsel within proper limits, deprived the accused of a fair trial. A bitter personal antagonism had developed between opposing counsel and this antagonism led not only to sharp personal exchanges of derogatory remarks but also to the mention of uncharged misconduct by the accused, reference to his having pleaded guilty to similar charges in a civilian court, and disclosure of his unsuccessful attempt to negotiate a pretrial agreement. Both counsel were mature members of the bar whose experience should have taught them better. As if this were not bad enough, counsel testified under oath on the stand with the lieutenant colonel trial counsel charging the defense counsel with an attempt to smear him as an individual trial counsel and the Air Force in general. Trial counsel then accused the defense counsel of unethical and improper trial conduct. Not to be outdone, the defense counsel, a retired colonel, repeatedly made similar allegations concerning the trial counsel.

In its decision in the *Lewis* case, the Court of Military Appeals noted that both attorneys had far exceeded the bounds of propriety and censured them for their unbridled outbursts and unjudicious exchanges which deprived the court-martial of the judicial caliber required by the Code. The Court condemned, as severely as possible, the unprofessional acrimonious exchanges of counsel in an effort to blacken each other's reputation before court members who had no official interest in their tirades.

Now, while a wag might say that the moral to counsel in this case is that people who live in glass houses should not throw stones, the true point is that while a trial is a battle, the combat envisioned in the military arena is that between the government and the accused according to the rules, not a pier six brawl between counsel.

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<sup>405</sup> *Id.*

<sup>406</sup> 16 U.S.C.M.A.145, 36 C.M.R. 301 (1966).

## 2. *Co-Counsel and Conflicts of Opinion.*

### a. *The Rules.*

Manual paragraph 46d:

When the defense is in charge of individual counsel, civil or military, the duties of defense counsel as associate counsel are those which the individual counsel may designate.

Canon 7 and Trial Code 6:

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to cooperate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel; generally this should be done only after communication with the lawyer of whom the complaint is made.

*b. The Case Law.* When the accused engages individual counsel, that attorney, acting with the consent of the accused, may act as leading counsel and take full charge of the defense in the case. However, individual counsel's assumption of that position and responsibility does not affect the appointed defense counsel's professional position by depriving him of or diminishing his status, dignity, or responsibilities as an officer and attorney. He does not thereby become a subordinate, clerk, or errand boy of individual counsel, required to follow the latter's bidding and instructions with reference to all matters.<sup>407</sup>

If individual defense counsel desires the continued assistance of appointed military counsel, he must be prepared to treat him

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<sup>407</sup> CM 399453, Williams, 27 C.M.R. 670, *pet. denied*, 10 U.S.C.M.A. 682, 27 C.M.R. 512 (1959).

as an associate—an equal—not as an underling. In the event it becomes apparent that the two counsel cannot resolve differences of opinion with regard to trial tactics, individual counsel should consult with the accused and, if the latter concurs, then request that the appointed defense counsel be excused from further participation in the case. Should this not be done, then neither individual counsel nor the accused can later be heard to criticize the appointed defense counsel's actions at trial in accordance with his own professional judgment, instead of adopting the views of individual counsel.<sup>408</sup>

Similar obligations also rest on the appointed defense counsel. He should consult with the accused when conflicts of opinion with co-counsel affect the accused's vital interests. Ethical considerations and the protection of his client's interest dictate that the appointed defense counsel's manner and deportment at trial not register disapproval or criticism of the individual counsel.<sup>409</sup>

When an accused pleads not guilty and his individual defense counsel presents a vigorous defense and final argument, associate defense counsel should not destroy his co-counsel's efforts and sacrifice the accused in uncalled-for closing remarks amounting to a confession of guilt. Although such conduct seems incomprehensible, it happened in *United States v. Walker*.<sup>410</sup> There, the Court of Military Appeals held that this open conflict between individual counsel and appointed defense counsel, as to what verdict the court should return, seriously lessened the force of the proffered defense of excusable homicide and substantially injured the defendant in his right to a fair trial.

### 3. *Agreements and Stipulations.*

#### a. *The Rules.*

Manual paragraphs 44g (1), 48d :

With a view to saving time, labor and expense both the trial and defense counsel should join in appropriate stipulations as to unimportant or uncontested matters.

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<sup>408</sup> *Id.*

<sup>409</sup> *See id.*

<sup>410</sup> 3 U.S.C.M.A. 355, 12 C.M.R. 111 (1953).

## Canon 25:

A lawyer should not ignore known customs or practice of the Bar of a particular Court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

## Trial Code 14(a) :

A lawyer should adhere strictly to all express promises to and agreements with opposing counsel, whether oral or in writing, and should adhere in good faith to all agreements implied by the circumstance or by local custom.

*b. The Case Law.* Counsel's word is his bond. The parties to a court-martial may make a written or oral stipulation as to fact or expected testimony.<sup>411</sup> An accused, who fails to object after having been afforded the opportunity to do so, is bound by stipulations entered into by his counsel, if the stipulation is accepted by the law officer (or president of the special court-martial) acting within his discretion.<sup>412</sup>

As a practical matter, stipulations may be defensive tactical instruments of no little importance. They may be used by counsel to avoid the danger of an adverse psychological effect produced by a parade of prosecution witnesses.<sup>413</sup> Counsel must be cautious, however, that he does not stipulate away the entire case or stipulate to matters which impeach his client's sworn testimony.<sup>414</sup> This is a precarious responsibility, and the judgment required by counsel involves a keen and accurate analysis of the situation.

Once a stipulation of fact has been offered and accepted in court, counsel are bound by it unless it is withdrawn or stricken from the record. Consequently, counsel may not later, during

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<sup>411</sup>MCM, 1951, ¶ 154b.

<sup>412</sup>United States v. Cambridge, 3 U.S.C.M.A. 377, 12 C.M.R. 133 (1953); NCM S-58-01854, Field, 27 C.M.R. 863 (1968).

<sup>413</sup>United States v. Colbert, 2 U.S.C.M.A. 3, 6 C.M.R. 3 (1952).

<sup>414</sup>NCM S-58-01854, Field, 27 C.M.R. 863 (1958). See MCM, 1951, ¶ 154b(1).

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final argument without other evidence in the record, argue facts inconsistent with that stipulation of fact.<sup>415</sup>

The wording of stipulations of fact in guilty plea cases must be carefully examined with a mature and experienced eye. If the facts stipulated conflict with the plea, that plea will be set aside as being improvident. However, in order to render that plea of guilty improvident, it is not sufficient to find the stipulated facts do not establish the guilt of the accused. They must conflict with his plea, negative his guilt, and show his judicial confession is inconsistent with what the parties to the trial have freely agreed are the facts constituting the occurrences giving rise to the charge.<sup>416</sup>

### B. CONTACT WITH THE OPPOSITE PARTY

#### 1. *The Rules.*

Manual paragraph 44h :

The trial counsel's dealings with the defense should be through any counsel the accused may have. Thus, if he desires to know how the accused intends to plead or whether an enlisted accused desires enlisted members on the court, he will ask the regularly appointed defense counsel or other counsel, if any, of the accused.

Canon 9 and Trial Code 16:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel, except in cases where opposing counsel has expressly consented to such communications or negotiations. He should avoid everything that might tend to mislead a party not represented by counsel, and he should not undertake to advise him.

2. *The Case Law.* Once the accused has defense counsel assigned to or retained by him, the trial counsel, his representatives, criminal investigation personnel, or any other person associated with the case must go through that defense counsel before ap-

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<sup>415</sup> United States v. Gerlach, 16 U.S.C.M.A. 383, 37 C.M.R. 3 (1966). Compare, however, stipulations of expected testimony. Such stipulations do not admit the truth of the indicated testimony. See MCM, 1951, ¶ 154b(2).

<sup>416</sup> United States v. Walter, 16 U.S.C.M.A. 30, 36 C.M.R. 186 (1966).

proaching the accused.<sup>417</sup> In the recent case of CM 410956, *Bostic*,<sup>418</sup> however, an Army board of review analogized paragraph 44h of the Manual to Canon 9, but held that the appointment of defense counsel to represent an accused as to one offense does not invalidate statements taken from that accused without the knowledge of his counsel by criminal investigators relative to an entirely different offense not yet the subject of criminal charges.

Paragraph 44h of the Manual is obviously based on Canon 9. An Air Force board of review in the *Seale* case<sup>419</sup> considered the application of Canon 9 to the military, and, as persuasive authority for its holding that it was unethical for the trial counsel to question the accused in the absence of defense counsel, the board cited an informal decision of the American Bar Association's Committee on Professional Ethics and a Texas State Bar interpretation of a similar canon which held to the same effect.<sup>420</sup> Although the board found no prejudice to the accused in the *Seale* case because the evidence of the accused's guilt was so convincing that it precluded any reasonable possibility of prejudice, the board issued a stern caveat that it would reverse any conviction without hesitancy in the event of a showing of a deliberate disregard of the Canons of Ethics which reasonably could have affected the deliberations of the court.

## VI. THE ADVOCATE'S DUTY TO HIMSELF

If good men were only better would the wicked be so bad? John Chadwick, A *Timely Question* (Stanza 1).

This above all: to thine own self be true, And it must follow, as the

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<sup>417</sup> CM 403428, Mason, 29 C.M.R. 599 (1960); CM 399759, Grant, 26 C.M.R. 692 (1958).

<sup>418</sup> 35 C.M.R. 511 (1964), *pet. denied*, 15 U.S.C.M.A. 409, 35 C.M.R. 381 (1965), distinguishing CM 403428, Mason, 29 C.M.R. 599 (1960), and CM 399759, Grant, 26 C.M.R. 692 (1958).

<sup>419</sup> ACM S-17411, Seale, 27 C.M.R. 951 (1958).

<sup>420</sup> *Id.* at 954. The board cited: (1) Informal Decision No. 249 (erroneously cited in the opinion as No. 241), ABA OPINIONS 640 (1957), stating that, where three persons are accused of related thefts, the prosecutor may not, in the proceedings against one of them, interview another of them represented by counsel in the absence of the latter's lawyer; and (2) Opinions 137 and 144, Rules and Canons of Ethics, State Bar of Texas, 1958, to the effect that it is unethical for a district attorney to deal directly with a defendant in a criminal case.



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night the day, Thou canst not then be false to any man. Shakespeare, *Hamlet*.

### A. THE LAWYER'S DUTY IN ITS LAST ANALYSIS

#### 1. *The Concept.*

#### Canon 32 and Trial Code 27:

No client, however powerful, nor any cause, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose minister he is, or disrespect of the judicial office, which he is bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a *patriotic* and loyal citizen.

#### Canons 15, 29, and 31, and Trial Code 10(b):

The lawyer must obey his own conscience and not that of his client. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

The responsibility for advising as to questionable transactions, and for urging questionable defenses is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

#### 2. *The Considerations.*

The ethical climate of the legal profession is maintained by two forces. The first is the effect of the individual attorney's conscience upon his professional conduct. The second is the appli-

cation, or threat of application, of legal sanctions against an erring attorney in disciplinary proceedings.<sup>421</sup>

The Canons and Trial Code represent the negative approach, saying: Thou shall not. They ought to be there, but the individual must keep stirring his own sense of conscience to remind himself that, for the most part, the codes of legal ethics represent the least, not the highest, standard to which one should *aspire*.<sup>422</sup> No lawyer is required to go against the dictates of his own conscience in the exercise of his advocacy. The advocate cannot, more than can any other man, keep his personal conscience and his professional conscience in separate vest pockets. Indeed, every advocate is, in some measure, also the keeper of his client's conscience.<sup>423</sup>

The incidents of trial are the counsel's responsibility. He may neither counsel nor countenance improprieties during the trial, nor should he permit his client to engage in such activities. Nor may counsel shift the burdens of his own conscience onto the shoulders of the law officer. Certainly, matter which is clearly inadmissible will be stricken by the law officer upon the objection of opposing counsel, and the court members will be instructed to disregard it. But can they? Human nature does not change merely because one dons the garb of a court member. The human mind is not *a* slate from which ideas and thoughts emblazoned thereon can be wiped out at the will and instruction of another. As a practical matter, court members cannot erase from their minds the damning effect of answers to questions that should not have been asked or evidence that should not have been shown.<sup>424</sup> To say that it is up to the law officer to decide is a mere subterfuge to avoid consideration of the basic ethical question whether such information should have been elicited in the first place. Counsel should not attempt to offer evidence before a court-martial which he knows to be inadmissible, although an offer in good faith of evidence of doubtful competency will not constitute a deliberate flouting of the Canons and the rules of evidence.<sup>425</sup>

In the last analysis, personal honor and self-truth must direct the advocate to his avowed goals of right conduct and justice,

<sup>421</sup> Sutton, *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 134 (1966).

<sup>422</sup> J. PIKE, *BEYOND THE LAW* 16 (1963).

<sup>423</sup> M. ORKINS, *LEGAL ETHICS*: 263-65 (1957).

<sup>424</sup> *United States v. Grant*, 10 U.S.C.M.A. 585, 28 C.M.R. 151 (1959)

<sup>425</sup> *United States v. Johnson*, 3 U.S.C.M.A. 447, 13 C.M.R. 3 (1953).

and he should not permit the instructions of his client or the desire to gain a victory to shunt him aside. He must so conduct himself as not to lose his own self-respect.

Within this framework of perfect intentions and imperfect men, an advocate's conduct should be guided by the words of a former Solicitor General of the United States:

In such a profession as the law there is no room for fellowship with the dishonest, the unfaithful, the untrustworthy, or the unpatriotic, and no useful place for those who are ignorant or inadequately prepared. It is our duty to the public, to the government, and to our profession to guard jealously professional standards and ideals, and to see that they are kept high and clear.<sup>426</sup>

### VII. DISCIPLINARY PROCEEDINGS ARISING FROM UNETHICAL PRACTICES OF COUNSEL

The temptations which beset a young man in the outset of his professional life . . . are very great. Sharswood, *Essay on Professional Ethics* 168-69 (5th ed. 1907).

Counsel must become less viciously contentious, more skillful, more intent on substance than on skirmishing for a better position. 1 *Wigmore, Evidence* § 8c(6) (3d ed. 1940).

Where the conduct of an attorney is such that all rightminded people would conclude that it is not honorable, it must necessarily be **un**-professional. Justice Farmer in *People v. Baker*, 311 Ill. 66, 82, 142 N.E. 554, 559 (1924).

#### A. SANCTIONS AND DISCIPLINARY POWER

##### 1. *Contempt and Disciplinary Proceedings.*

Under article 48 of the Code, a court-martial may punish for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder. Such punishment may not exceed confinement for thirty days or a fine of \$100, or both. This article has been interpreted to encompass contemptuous conduct by an attorney.<sup>427</sup>

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<sup>426</sup> Address by former Solicitor General of the United States William M. Frierson, Banquet, Conference on Legal Education, National Conference of Bar Associations, 23-24 Feb. 1922, in 8 A.B.A.J. 156 (1922).

<sup>427</sup> See *United States v. DeAngelis*, 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953); MCM, 1961, ¶ 10.

When the conduct of a person before a court-martial constitutes a contempt within the meaning of article 48, the regular proceedings *of* the court are suspended, and the person is directed to show cause why he should not be held in contempt. He is given an opportunity to explain his conduct, and the law officer then rules as to whether the person should be held in contempt, subject to objection of any member of the court-martial. The procedure here *is* the same as that on a motion for a finding of not guilty. After there has been a preliminary determination that the person be held in contempt, the court-martial then closes and, by two-thirds vote on secret written ballot, determines whether the person should be held in contempt and, in the event of conviction, an appropriate punishment. In order to be effective, a punishment for contempt requires the approval of the convening authority, who designates the place of confinement if any has been adjudged.<sup>428</sup>

In *United States v. DeAngelis*,<sup>429</sup> the Court of Military Appeals described an individual defense counsel's language as provocative and highly insulting. It concluded that it could not ignore counsel's contemptuous tirades and pointed out that his obstructive and abusive actions flouted the authority of the law member,<sup>430</sup> made a mockery of the requirement of decorous behavior, and impeded the expeditious, orderly, and dispassionate conduct of the trial. The Court went on to state that, in instances of such flagrantly contemptuous conduct, law officers should not hesitate to employ the contempt provisions of the Code after counsel has been warned concerning his actions.

## 2. *Suspension of Counsel.*

Under paragraph 43 of the Manual, action may be taken by a convening authority to recommend suspension from practice before courts-martial of any counsel acting before a court-martial who is guilty of professional or personal misconduct of such a serious nature as to show that he is lacking in competence, integrity, or ethical or moral character. Suspension will only be effected *by* The Judge Advocate General of the armed force concerned after a hearing before a board of certified attorneys at the

<sup>428</sup> MCM, 1951, ¶ 118.

<sup>429</sup> 3 U.S.C.M.A. 298, 12 C.M.R. 54 (1953).

<sup>430</sup> The *DeAngelis* case was commenced prior to the effective date of the Code.

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general court-martial level.<sup>431</sup> Suspension by The Judge Advocate General of one armed force does not automatically result in suspension from practice before the courts-martial convened in another service;<sup>432</sup> however, such suspension may be grounds for suspension by other services.<sup>433</sup> Such suspension is separate and distinct from any matter involving contempt under article 48 of the Code and from withdrawal of certification pursuant to articles 26 and 27 of the Code.<sup>434</sup>

Misconduct warranting suspension includes:<sup>435</sup>

- a. Demonstrated incompetence while acting as counsel during pretrial, trial or post trial stages of a court martial ;
- b. Preventing or obstructing justice, including the deliberate use of frivolous or unwarranted dilatory tactics ;
- c. Fabricating papers or other evidence ;
- d. Tampering with a witness ;
- e. Abusive conduct toward the members of the court, the law officer or other counsel ;
- f. Conviction of a felony or any offense involving moral turpitude or a contempt conviction under article 48 of the Code ;
- g. An attempt by one who is a security risk to act as counsel in a case involving a security matter;
- h. Disbarment or suspension from practice by a Federal, State or foreign court;
- i. Suspension from practice as counsel before courts-martial by The Judge Advocate General of another armed force, General Counsel of the Treasury Department or by the United States Court of Military Appeals ; and
- j. Flagrant or continued violations of any specific rules of conduct prescribed for counsel in paragraphs 42, 44, 46 and 48 of

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<sup>431</sup> NAVY JAG MANUAL § 0135c(3), (4); Army Reg. No. 27-11, para 3c, *d* (5 March 1965) [hereafter cited as AR 27-11].

<sup>432</sup> MCM, 1951, ¶ 43. See B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL 162 (1957).

<sup>433</sup> NAVY JAG MANUAL § 0135b(9); AR 27-11, para. 2.

<sup>434</sup> NAVY JAG MANUAL § 0135a, c(5); AR 27-11, para. 5.

<sup>435</sup> See NAVY JAG Manual § 0135b; AR 27-11, para. 2.

the Manual, or in the Canons of Professional Ethics adopted by the American Bar Association, or in the Code of Trial Conduct adopted by the American College of Trial Lawyers.

Action to suspend should not be initiated solely because of personal prejudice or hostility toward counsel because he has presented an aggressive, zealous, or novel defense, or when his apparent misconduct as counsel stems solely from inexperience or lack of instruction in the performance of legal duties.<sup>436</sup> Nor should suspension action be initiated unless other available remedial measures, including punitive action, have failed to induce proper behavior or are inappropriate.<sup>437</sup>

All counsel—military or civilian—appearing before a court-martial are subject to suspension proceedings for misconduct, except that, in contrast to the Navy's position, the Army's proceedings are not applicable to noncertified counsel appearing before a special court-martial unless the accused has selected or provided him as counsel under article 38(b) of the Code.<sup>438</sup>

The Judge Advocate General of the service concerned may, upon petition of a person who has been suspended and upon the showing of good cause, modify or revoke any prior order of suspension.<sup>439</sup>

## VIII. CONCLUSIONS

**What is left when honor is lost? Publilius Syrus, *Maxim* 265.**

The Canons of Professional Ethics are like the Holy Bible—everyone knows of them and thinks he knows what they say, but few have really read and studied them.

Our court-martial system under the *Uniform Code of Military Justice* is bottomed on the adversary system. The primary purpose of that system is to preserve liberty and, concomitantly, to find and act upon the truth as nearly as that may be possible within the context of the adversary system. Accordingly, the government always wins its cases when justice is done—even though the result may be acquittal.

Military advocates practicing before courts-martial occupy a

<sup>436</sup> NAVY JAG MANUAL § 0135b.

<sup>437</sup> NAVY JAG MANUAL § 0135c(1) ; AR 27-11, para. 3.

<sup>438</sup> Compare NAVY JAG MANUAL § 0135a, with AR 27-11, para. 1.

<sup>439</sup> NAVY JAG MANUAL § 0135c(4) ; AR 27-11, para. 4.

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unique position. They are the heart of an adversary system inside a military world dealing with human beings in a rapidly changing environment. Theirs is the privilege of contest in an arena circumscribed by ethical responsibilities which have the force of law as prescribed by the Manual for Courts-Martial and departmental regulations.

Violations of professional ethics by trial counsel, which demonstrate an intention to deliberately flout the Canons or could have reasonably affected the deliberations of the court members on either the findings or sentence, may be held to be prejudicial to the accused and result in a reversal of his conviction, unless there is other clear and convincing evidence of his guilt.

Moreover, a word to the wise: Both trial counsel and defense counsel, who violate the Canons, the Manual adaptation thereof, or the Trial Code, subject themselves to the probability of censure from the law officer and appellate tribunals and the possibility of contempt and/or suspension proceedings.

But only a knowledgeable, voluntary acceptance of and adherence to the rules of the contest by the military officer-lawyer, rather than a fear of sanction, will produce a military bar truly in keeping with the high traditions of our honorable dual professions.

The many ethical responsibilities which flow from the role of lawyer as an advocate in the military adversary system are succinctly embodied in the preamble to the Trial Code and the Canons :

To his client, the advocate owes undivided allegiance, the utmost application of his learning, skill and industry and the employment of all appropriate legal means within the law and the spirit of the Canons ;

To opposing counsel, the advocate owes the duty of courtesy, candor in the pursuit of truth, cooperation in all respects not inconsistent with his client's interests and scrupulous observance of all mutual understandings ;

To the court, the advocate owes respect, diligence, candor and the maintenance of dignity but no obligation to produce evidence against his client ;

And to his service and country, the military advocate owes the maintenance of professional dignity, bearing, allegiance and independence as a military officer-lawyer.

## ETHICS OF ADVOCATES

The ethical responsibilities to which advocates must adhere complement, rather than conflict with, each other. They consist **of a** composite of principles and rules salted with decisional interpretations, admonitions, and suggestions, all aimed at achieving the best performance out of the best lawyers the military can obtain.





# THE IMPACT OF LABOR DISPUTES ON GOVERNMENT PROCUREMENT\*

By Major Dulaney L. O'Roark, Jr.\*\*

*This article contains an examination of the effect of labor disputes on the administration of government contracts. The author discusses the application of labor law to federal agencies and government contractors, with special consideration being given to the problem of picketing at federal installations.*

## I. INTRODUCTION

The continuing growth in volume of government procurement has brought federal agencies into more frequent contact with many of the contingencies in contracting more commonly associated with the business risk in commercial operations. Paramount among these is the increased involvement of federal agencies in labor disputes, as demonstrated by the recent strikes at U.S. space research facilities. In view of this growing problem area, this article has been prepared with a two-fold purpose: First, it is intended to provide a general examination of the effect of a labor dispute on the administration of government contracts; and second, it is intended to provide an evaluation of existing labor law as it applies to federal agencies and government contractors.

Consideration will be given first to the effect of a labor dispute on the administration of government contracts from the standpoint of award and termination for default. Attention will then focus on an analysis of the Labor-Management Relations (Taft-

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Hartley) Act<sup>1</sup> and decisions which have defined the status of federal agencies and government contractors under this Act. With this analysis as a foundation, there will follow a study in depth of the consequences of picketing at federal installations in an effort to determine the legitimate scope of such picketing and the courses of action available to the federal authorities in mitigating its impact.

It should be noted that the scope of this article does not encompass industry-wide strikes amounting to a national emergency,<sup>2</sup> the relatively new field of federal employee unionization,<sup>3</sup> or labor standards prescribed for government contracts.<sup>4</sup>

### 11. CONTRACT ADMINISTRATION DURING A LABOR DISPUTE

#### A. THE EFFECT OF A LABOR DISPUTE ON AWARD

Federal law regulating government procurement<sup>5</sup> requires that contracts be awarded only to responsible contractors.<sup>6</sup> For a contractor to qualify as responsible he must, *inter alia*, be able to comply with the required or proposed delivery schedule,<sup>7</sup> have a satisfactory record of past performance,<sup>8</sup> and possess the

<sup>1</sup> 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964) [hereafter cited as LMRA].

<sup>2</sup> See National Labor Relations Act § 206, 61 Stat. 155 (1947), 29 U.S.C. § 176 (1964).

<sup>3</sup> For a comprehensive examination of this subject, see Reynolds, *The Role of an Air Force Commander in Employee-Management Relations*, 7 AF JAG L. REV. 5 (No. 3, May-June 1965).

<sup>4</sup> These standards concern the use of convict labor, child labor, hours, wages, etc. See 18 U.S.C. § 436 (1964); 76 Stat. 357 (1962), 40 U.S.C. § 328 (1964); Davis-Bacon Act, 49 Stat. 1011 (1931), 40 U.S.C. § 276a-a7 (1964); Walsh-Healey Public Contracts Act, 49 Stat. 2036 (1936), 41 U.S.C. §§ 35-45 (1964); Fair Labor Standards Act, 52 Stat. 1060 (1963), 29 U.S.C. §§ 201-19 (1964).

<sup>5</sup> Federal law concerning government procurement consists of two parallel sets of laws. The body of law covering armed services procurement was first centralized in the Armed Service Procurement Act of 1947 (62 Stat. 21). In 1958 this Act, along with the substantive law governing armed services procurement, was made chapter 137 of title 10 (10 U.S.C. § 2303(a) (1964)). These laws have been further implemented by regulation in the Armed Services Procurement Regulation [hereafter cited as ASPR] and the Army Procurement Procedure [hereafter cited as APP]. The Federal Property and Administrative Services Act of 1949 (68 Stat. 1126 (1954), 40 U.S.C. § 471 (1964)) was enacted for procurement activities of nonmilitary executive agencies. This Act has been implemented by the Federal Procurement Regulations.

<sup>6</sup> ASPR § 1-902 (Rev. No. 11, 1 June 1965).

<sup>7</sup> *Id.* § 1-903.1(ii).

<sup>8</sup> *Id.* § 1-903.1(iii).

necessary organization, experience, operational controls, and technical skills, or the ability to obtain them.<sup>10</sup> When a contractor is known by the contracting officer to have either a potential or existing strike at his place of business, or is known to have had a history of conflict with his employees, the question of his responsibility as to one or more of these factors is raised. If awarded the contract, will the contractor be able to perform on time? Will he even have an organization with which to attempt performance? What weight is to be given to past labor difficulties in making an award? These and related questions must be answered by the contracting officer prior to making award, when the lowest bid or proposal is submitted by a contractor with either existing or potential labor problems.<sup>11</sup>

## *1. The Effect of a Potential or Existing Labor Dispute on Ability to Perform.*

When a contractor is experiencing labor difficulties at the time for award, two questions are raised concerning his responsibility. The contracting officer must first determine whether the contractor will have the organization to perform<sup>12</sup> and, if so, whether he will be able to maintain sufficient output to meet the required delivery or performance schedule.<sup>13</sup> Should either of these questions be answered in the negative, the contracting officer could properly decline award on the basis of nonresponsibility.<sup>14</sup>

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<sup>9</sup>*Id.* § 1-903.1(iv).

<sup>10</sup>*Id.* § 1-903-2(a)(ii).

<sup>11</sup>One of the more significant results from the standpoint of contract administration that could occur from an improvident award in this situation is that an unsuccessful contractor might make a protest. Such protests are usually addressed to the contracting officer and may be received either before or after award. (Sometimes protests are made directly to the Comptroller General.) Both the ASPR and the APP provide specific guidance for handling such protests and, in particular, the procedure to follow when a protest has been made directly to the Comptroller General. *See* ASPR § 2-407.9 (Rev. No. 4, 6 March 1964) and APP § 2-407.9 (Change No. 2, 25 March 1966). It should be noted that protests to the Comptroller General have generated the only case authority concerning interpretation of award regulations. This is true because contractors who have been denied award have no contract with the government and, therefore, lack the required contractual basis to bring their case before either the United States Court of Claims or the Armed Services Board of Contract Appeals. *See* Standard Steel Works, Inc., ASBCA No. 8785, 29 March 1963, 1963 B.C.A. para. 3704; Tucker Act, 28 U.S.C. § 1491 (1964).

<sup>12</sup>*See* ASPR § 1-903.2(a) (Rev. No. 11, 1 June 1965).

<sup>13</sup>*See id.* § 1-903.1(ii).

<sup>14</sup>This conclusion is based on Comptroller General decisions which indicate

The basic problem for the contracting officer is evaluation of the circumstances. This is particularly difficult, because obtaining sufficient reliable information with which to make an appropriate judgment of the extent of the labor dispute and its impact on the contractor's operations is not easy. As a rule, the contracting officer is limited to information volunteered by the contractor, local news media, his own contacts in the business community, and the like. The chances for a full picture of the scope of the contractor's labor difficulties developing from these sources without considerable effort on the part of the contracting officer are slight.

It has been suggested as a solution to this problem that all contractors making an offer for a government contract be required to submit, prior to award, information concerning any strike which affects or may affect his ability to perform.'; The advantages of such a procedure are apparent; however, the practicability is subject to question. A contractor is reluctant to volunteer information which could jeopardize his chances for award. As a result, he will hesitate to admit that his ability to perform has been endangered by labor difficulties, whereas the contracting officer on the same facts might believe performance to be impossible. Considering this disparity of interest, the inherent subjectivity of evaluation of the scope of the effect of a strike,

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that reasonably expected labor difficulties in performance of a contract are a basis for finding that a contractor is not responsible and not eligible for award. The Comptroller General ruled in 35 Comp. Gen. 460 (1956) that a contractor is not liable for excess cost when the government awards a contract with full knowledge of an existing strike at the contractor's plant. In so doing, the government is held to have assumed the risk of default as a result of the strike. It may be inferred from the reasoning in this decision that the government need not assume this risk and is free to deny award to the contractor because of labor problems. In a subsequent decision, the Comptroller General ruled that a contractor had been improperly declared nonresponsible because he had defaulted on a prior contract as a result of a strike. However, this decision was based on the finding that the labor difficulties which had caused the contractor to default on the prior contract were not likely to recur. It was clearly indicated that, if there was a reasonable basis to expect labor difficulties to interfere with performance of the current contract, the finding of nonresponsibility would have been proper. 43 Comp. Gen. 323 (1963).

"See Green, *The Effect of a Labor Dispute on the Administration of a Government Contract*, 70 HARV. L. REV. 793, 805 (1957). This suggestion proposed revising contract procedures to require bidders, or those submitting proposals on negotiated procurement, to notify the contracting officer prior to award of any strike which would bear on performance,

and the rapidly changing circumstances of most labor disputes, it is doubtful that such a requirement would result in significant additional information being furnished to the contracting officer.

It is equally inadvisable to go one step further and require contractors to disclose all labor difficulties regardless of connection with the contract under consideration. This raises the spectre of unnecessary government interference with private business and would likely bring all the attendant criticism that charges of this nature evoke. Consequently, there appears to be little in the way of assistance for the contracting officer in obtaining this information. It is incumbent upon him to marshal the facts through sources presently available with sufficient thoroughness to protect the government's interest.

Upon obtaining information concerning a contractor's labor difficulties, the contracting officer is then faced with the problem of assessing the effect of the labor dispute on the contractor's ability to perform. When a strike has resulted in a complete shutdown of operations, he can only estimate the duration in order to determine whether the contractor might have sufficient remaining time to perform the contract. In the case of a partial shutdown, he must decide whether the contractor's reduced rate of production and other commitments permit performance of the contract within the required time. If the contractor's labor difficulties are pending and have not yet developed into a curtailment of operations, the contracting officer must speculate on the likelihood of such a result. Should the contracting officer judge incorrectly and award to a contractor who subsequently cannot perform because of labor problems known to the contracting officer at time of award, then the government may be deprived of its right to assess excess costs upon termination for default and repurchase.<sup>16</sup> Furthermore, the termination for default may be considered to have been improper and automatically converted to a termination for convenience entitling the contractor to a settlement under the termination for convenience clause.<sup>17</sup> Should

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<sup>16</sup> See notes 47-49 *infra* and accompanying text.

<sup>17</sup> This result may occur when the contract involved contains either the standard default clause for fixed price supply contracts (ASPR § 8-707 (Rev. No. 9, 29 Jan. 1965)) or the standard default clause for fixed price construction contracts (ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965)) and a termination for convenience clause (ASPR § 8-701 (Rev. No. 16, 1 April 1966)). Both default clauses provide for the government the contractual right to charge excess costs against the contractor's account upon termination for default and

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the contracting officer decide not to terminate under these circumstances and insist upon performance without granting a time extension for the delay resulting from a strike, the results will be equally undesirable. This decision is likely to be considered a constructive change entitling the contractor to an equitable adjustment under the changes clause.<sup>18</sup> On the other hand, because of the emphasis on close pricing in government contracting,<sup>19</sup> the contracting officer must have a strong case substantiating his denial of award to a low offeror on the basis of nonresponsibility resulting from labor difficulties. Obviously, an incorrect judgment could result in the nullification of the entire procurement by the Comptroller General.<sup>20</sup>

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repurchase. However, paragraph (e) of both standard default clauses provides that, if after termination for default it is determined for any reason that the contractor was not in default, the termination for default will be treated as though it was termination for the convenience of the government. When this occurs, instead of being chargeable with the excess cost of repurchase, the contractor is entitled to payment for his attempted performance as determined by the formula contained in the termination for convenience clause.

<sup>18</sup> Required in government contracts is a changes clause (ASPR § 7-103.2 (Rev. No. 10, 1 April 1965)), which permits the contracting officer, within certain limits, to order changes in the performance of the contract. This clause provides, if appropriate, for a payment of an equitable adjustment to the contractor when a change is made. The Armed Services Board of Contract Appeals has used the changes clause as a vehicle to cover situations not contemplated by the clause, including situations where the contracting officer clearly never intended to make a change in the contract. Such changes are called "constructive changes" and includes the situation where a contracting officer requires performance earlier than a contractor is legally bound to perform because of excusable delay resulting from fire, natural disaster, strikes and the like (called "acceleration." See *Electronic & Missile Facilities, Inc.*, ASBCA No. 9031, 23 July 1964, 1964 B.C.A. para. 4338). When this occurs, the contract is treated as though the contracting officer had changed the contract by moving up the date for performance, thus entitling the contractor to an equitable adjustment under the changes clause. It follows that, when a contracting officer requires performance when a contractor is delayed because of a strike which constitutes excusable delay, the chances of this being treated as acceleration and a constructive change are apparent.

<sup>19</sup> An example of this requirement is found in the formal advertising procedures which require award to be made to the lowest, responsible, responsive bidder, price and other factors considered. See ASPR § 2-407.1 (Rev. No. 17, 1 June 1966). The Comptroller General has construed this requirement narrowly, as illustrated by the interpretation given to the language "other factors considered." In 37 Comp. Gen. 550 (1958), it was held that this phrase does not broaden or introduce new bid evaluation criteria permitting awards to other than the lowest bidder—such as experience, superior performance, etc.—when the low bidder is able to meet the specifications.

<sup>20</sup> See 16 Comp. Gen. 171 (1936); 17 Comp. Gen. 554 (1938). The Comp-

Because each case turns on its own facts, it is not feasible to formulate general rules of application in evaluating the effect of a labor dispute on a contractor's ability to perform. The key is obtaining adequate information on which to base a conclusion. Provided this is done and the conclusion reached is reasonable and not arbitrary, the contracting officer's decision will in all probability withstand any charge of impropriety.

### *2. The Effect of Past Labor Difficulties on the Contractor's Record of Performance.*

When considering a contractor's responsibility, a contracting officer may appropriately take into account his unsatisfactory performance of other government contracts." From this general statement it would seem to follow that a contracting officer could properly deny award on the basis of nonresponsibility to a contractor who had defaulted on prior contracts because of labor problems. Notwithstanding the logic of this argument, a definitive Comptroller General decision on this specific point compels a different conclusion."

The circumstances underlying the Comptroller General's decision concerned a contractor who had been terminated for default as a result of his failure to satisfactorily perform a contract in Minneapolis. The reason for the default was that the job site had been picketed by the contractor's striking employees, who were protesting the contractor's alleged unfair labor practices. When the same contractor later bid on a contract to be performed in New York, the contracting officer declared him nonresponsible and awarded the contract to another bidder. Upon protest, the Comptroller General ruled that a default on a prior contract is not per se sufficient basis for declaring a contractor nonresponsible. The circumstances of a contractor's failure to perform properly must also be considered. Therefore, a default caused by a labor dispute in an earlier contract is not a proper matter for consideration or determination of the contractor's responsibility on a subsequent contract, unless the same events which caused the failure to perform the earlier contract could reasonably be expected to recur. Because the labor dispute which caused the contractor's default in the prior contract was local in

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troller General accomplishes this by denying payment in those situations where contracts are awarded in violation of procurement statutes.

<sup>21</sup> See ASPR § 1-903.1(iii) (Rev. No. 11, 1 June 1965).

<sup>22</sup> See 43 Comp. Gen. 323 (1963).



nature and could not reasonably be expected to recur in New York, the Comptroller General concluded that it had been improper to declare the contractor nonresponsible and ineligible for award.

This decision rules out declaring a contractor nonresponsible solely because of labor difficulties which caused defaults on earlier contracts. Regardless of the extent of a contractor's prior labor problems, the contracting officer must find that "they may reasonably be expected to carry over and affect the contemplated procurement." This result, for all practical purposes, merges past and present labor difficulties insofar as they bear on a contractor's eligibility for award of government contracts. It follows that a contracting officer's approach when a contractor has a history of labor problems will be identical to his approach when the contractor has current labor problems. He may, therefore, disqualify such a contractor only when he has an existing labor dispute which will affect the present contract as discussed in the preceding section.\*

### 3. *The Effect of a Contractor's Violation of the Labor Management Relations Act on His Record of Integrity.*

The issue in the preceding two sections has been the effect of a labor dispute on a contractor's responsibility in terms of his present ability to perform a contract. Additionally, it is pertinent to consider whether a contractor should be ruled nonresponsible for lack of integrity" when he is in violation of the Labor Management Relations Act (LMRA) by committing an unfair labor practice as defined in the Act or by ignoring an order of the National Labor Relations Board (NLRB).<sup>26</sup> In such a situation the contractor's ability to perform may in no way be impaired, and the sole question for the contracting officer to consider in

<sup>23</sup> See *id.* at 325-26. This apparently is true even if earlier labor problems were the result of the contractor's bad faith in his labor practices.

<sup>24</sup> The Comptroller General's position may seem arbitrary in eliminating prior labor difficulties as a grounds for finding an offeror nonresponsible. However, it is suggested that this result is simply an extension of the Comptroller General's firm policy that award of government contracts be made whenever possible on the basis of the most favorable price to the government. See note 19 *supra*.

<sup>25</sup> See ASPR § 1-903.1(iv) (Rev. No. 11, 1 June 1965).

<sup>26</sup> The term "unfair labor practices" and other references to labor policy and standards in this section all relate to the definitions and standards established in the LMRA. For a discussion of the LMRA and a detailed explanation of these terms and standards, see notes 60-66 *infra* and accompanying text.

terms of responsibility is the question of the contractor's integrity.

The underlying question in this area is whether government procurement should be used as a means of enforcing national labor policy as established by Congress in the LMRA by denying contracts to employers who fail to conform to the required standards. The Comptroller General seemingly had settled this question with two decisions which firmly held that government procurement is not to be used for this purpose.<sup>27</sup> In his first decision on this issue, the Comptroller General ruled that noncompliance with an NLRB order to cease and desist from an unfair labor practice is not a ground for denying eligibility for award.<sup>28</sup> This position was supported in a subsequent decision which held that, in the absence of specific statutory authority, contractors could not be excluded from consideration for award because of unfair labor practices. The Comptroller General further noted that the NLRB had been designated as the federal agency with exclusive responsibility for preventing unfair labor practices.<sup>29</sup>

Two recent decisions have raised some question whether the foregoing holdings continue to be valid. The Comptroller General, in considering the protest of a contractor who had been declared ineligible for award because of strike-caused default, held that a contractor's labor practices could be considered in making an award if it appears that the labor practices may affect performance of the contract.<sup>30</sup> Additionally, the Armed Services Board of Contract Appeals (ASBCA),<sup>31</sup> in determining whether a con-

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<sup>27</sup> These Comptroller General decisions concern labor legislation prior to the LMRA. However, the LMRA is the current enactment of the statutes at issue in those decisions and, consequently, they are considered to be valid at this time.

<sup>28</sup> See 17 Comp. Gen. 37 (1937). This decision was based on the fact that Congress had provided various means of enforcing federal legislation governing labor relations but had not included withholding of government contracts as one of these means. It was also noted that at the time of this decision no court ruling concerning the contractor's compliance with the law had been made and that, in effect, the issue of compliance was still open.

<sup>29</sup> See 18 Comp. Gen. 285 (1938). It should be noted that the jurisdiction of the NLRB has been amended by subsequent legislation. However, the validity of the Comptroller General's conclusion that the NLRB has exclusive federal responsibility for preventing unfair labor practices was not affected.

<sup>30</sup> See 43 Comp. Gen. 323 (1963). The thrust of this decision was primarily at the issue of whether the contractor's labor practice would result in an inability to perform, and not to the question of whether the contractor should be considered nonresponsible solely because of his unfair labor practices.

<sup>31</sup> See Bill Powell, d/b/a Bill's Janitor Serv., ASBCA Nos. 10345 & 10393, 16 June 1965, 1965-2 B.C.A. para. 4916. ASBCA's consideration of the con-

tractor had been properly terminated for default when he failed to perform due to labor problems, first considered the reasonableness of the contractor's labor practices before reaching a decision. It should be noted that neither of these decisions was directed at the question of use of government procurement as a means of enforcing the labor policy contained in the LMRA. Furthermore, in view of the far-reaching effect of a reversal of the initial Comptroller General position on this issue, it is doubted that either the Comptroller General or the ASBCA had any intention of disturbing an otherwise settled policy. This conclusion is supported by the fact that not using government procurement to enforce the LMRA is to the distinct advantage of federal agencies performing procurement functions. Few contracting officers possess the necessary expertise to determine whether a contractor is in compliance with the LMRA or to judge the merits of a labor dispute. Furthermore, the NLRB frequently takes several months or longer to rule on the legality of a contractor's labor practices, and then such decisions are subject to review by the courts. If it were necessary to wait for a final decision, important procurement could be delayed indefinitely. However, with no responsibility to enforce compliance with the LMRA, contracting officers may make awards promptly and without danger of the procurement being nullified by an erroneous determination of a contractor's status." For these reasons, it is probably safe to conclude that a contracting officer need not concern himself with a contractor's status under the LMRA and should not declare a contractor ineligible for award for lack of integrity, even though it appears that the contractor is committing an unfair labor practice or is in defiance of an NLRB order.<sup>35</sup>

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tractor's labor practices was perfunctory at best and consisted only of an assertion in the decision that they were proper. There was no evidence in the report that ASBCA had evaluated the contractor's labor practices in terms of the LMRA.

"See generally Green, *The Effect of a Labor Dispute on the Administration of a Government Contract*, 70 HARV. L. REV. 793 (1957).

"This is not to infer that a contractor's violation of labor standards contained in required clauses in government contracts is to be ignored or condoned. ASPR § 1-603(a) (Rev. No. 11, 1 June 1965) sets out grounds for debarring, suspending, or declaring a contractor ineligible for award. Included are violations of the labor standards specified for government contractors by required contract clauses (see note 4 *supra*). If a contracting officer is aware of a contractor's violation of any of the required standards, the pro-

B. *TERMINATION FOR DEFAULT AS A  
RESULT OF A LABOR DISPUTE*

By inclusion of a default clause in government contracts, the government creates the dual right to terminate a contract when a contractor fails to perform, to reprocure the goods or services, and to charge against the defaulting contractor's account any excess costs which may result from the reprocurement.<sup>34</sup> Although the language in the default clauses varies depending on the type of contract involved, the basic reasons for terminating a contract under existing default clauses are: (1) the contractor's failure to make timely delivery; (2) the contractor's failure to comply with any other provision in the contract; and (3) the contractor's failure to make progress or to prosecute the work with diligence.<sup>35</sup>

The government's right to charge the additional cost of reprocurement to the defaulting contractor is not absolute. It is qualified by the excusable delay provision in the standard default clauses under which the government is not entitled to excess cost if the default results from causes beyond the control and without the fault or negligence of both the contractor and any involved subcontractors.<sup>36</sup>

cedures set out in ASPR concerning disbarment, ineligibility, and suspension of contractors should be consulted and action consistent with the circumstances taken. The distinction between enforcing these labor standards and those contained in the LMRA is that labor standards required in government contracts are specifically intended by Congress to be implemented and enforced by use of government procurement. LMRA standards, on the other hand, are implemented and enforced by the NLRB. *See also* APP § 1-601 (Change No. 2, 25 March 1966).

<sup>34</sup> For the standard default clause for fixed price supply contracts, see ASPR § 8-707 (Rev. No. 9, 29 Jan. 1965); for the standard default clause for construction contracts, see ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965).

"These grounds for termination are those named in either the default clause for fixed price supply contracts (*see* paragraph (a) of the standard default clause set out in ASPR § 8-707 (Rev. No. 9, 29 Jan. 1965)), or the default clause for fixed price construction contracts (*see* paragraph (a) of the standard default clause set out in ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965)). Default clauses for other types of contracts such as research and development contracts (ASPR § 8-710 (Rev. No. 9, 29 Jan. 1965)) and architect-engineer contracts (ASPR § 8-711 (Rev. No. 9, 29 Jan. 1965)) use slightly different language in stating grounds for termination, but they are basically the same as those contained in the supply and construction contract default clauses. Since the great majority of government contracts are of the supply and construction type, only the default clauses used in supply and construction contracts will be considered in this section.

<sup>36</sup> *See* paragraph (c) of the default clause contained in ASPR § 8-707 (Rev. No. 9, 29 Jan. 1965), and paragraph (d)(1) of the default clause contained in ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965).

When a contractor fails to perform because of alleged labor problems, the contracting officer must take into account two major factors before determining whether the labor problems constitute excusable delay entitling the contractor to an extension of time or whether termination for default is appropriate.<sup>37</sup> First, he must consider whether the labor dispute was the actual cause of delay in performance and, if so, in certain cases, whether the labor dispute was foreseeable. Second, he must consider whether the dispute was beyond the contractor's control and was without his fault or negligence. As will be seen, a decision to terminate a contract for default is particularly difficult in circumstances involving a labor dispute.

### 1. *Was the Labor Dispute the Cause of Delay?*

Strikes are cited specifically in the standard default clauses as a valid excuse for delay in performance.<sup>38</sup> Therefore, when a contractor alleges that delay in performance was caused by a strike, the contracting officer's primary concern will be in obtaining sufficient evidence to substantiate this claim. The ASBCA has given some general guidance in determining the amount of evidence required. It has been ruled that a contractor's bare assertion, without a factual showing, that a strike was the cause of delay does not constitute excusable delay.<sup>39</sup> On the other hand, the ASBCA has held that, when a contracting officer terminated for default without knowledge of a strike and the contractor was later able to show convincingly that a strike had occurred, the delay resulting from the strike was excusable.<sup>40</sup>

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<sup>37</sup> Other factors which must be considered in making this determination are, *inter alia*, the availability of the supplies or services from other sources, the urgency of the need for the supplies or services, and the effect of a termination for default on the contractor. See ASPR § 8-602.3 (Rev. No. 14, 1 Dec. 1965). Even if the circumstances justify termination for default, the contracting officer should consider whether a no-cost termination is appropriate. See ASPR § 8-209.4 (1 March 1963).

<sup>38</sup> See paragraph (c) of the default clause contained in ASPR § 8-707 (Rev. No. 9, 29 Jan. 1965) and paragraph (d)(1) of the default clause contained in ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965).

<sup>39</sup> Hercules Food Serv. Equip., Inc., ASBCA No. 3875, 6 June 1957, 1957-1 B.C.A. para. 1335. The contractor failed to make any factual showing as to the existence and duration of the alleged strike and work stoppages or of the actual extent of delay that might have been caused.

<sup>40</sup> See Bill Powell d b a Bill's Janitor Service, ASBCA Nos. 10345 & 10393, 16 June 1965, 1965-2 B.C.A. para. 4916. This case is complicated by the fact that both a failure to make progress and a failure to perform were involved. The government attempted to support the termination on both grounds. The

These decisions point up the importance to the contracting officer of being fully informed of the circumstances of a strike prior to terminating a contractor for default. As previously discussed, this is the responsibility of the contracting officer, and a failure to make a thorough investigation prior to making a decision will likely result in injury to the government's position in any resulting dispute proceedings.

After deciding that a strike is the cause of delay in performance, the contracting officer cannot automatically conclude that the delay is excusable. This is true, among other reasons, because of a distinction between the wording of the standard default clause for construction contracts and the standard clause for supply contracts. For a delay to be excusable in a construction contract, the cause of delay must not have been foreseeable; in a supply contract, there is no foreseeability restriction.<sup>41</sup>

In view of this distinction, when considering whether to terminate a construction contract which has been delayed because of a strike, the contracting officer must determine whether the contractor reasonably could have anticipated that a strike would take place resulting in inability to perform. If such is the case, the strike normally will not be an excusable delay, and the contractor is liable for excess cost upon a default termination.<sup>42</sup> If a strike affecting a construction contractor's ability to perform is in

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ASBCA found that termination for failure to make progress was improper, because the contracting officer failed to give the contractor the required 10-day period to correct deficiencies after having sent him a warning letter. (Waiver was also involved.) As an alternative justification for termination, the ASBCA considered the contractor's failure to perform during the strike. Had the strike not constituted excusable delay, the ASBCA indicated that the termination would have been proper notwithstanding the fact that the 10-day cure period had not passed. The fact that the contracting officer apparently was unaware that the failure of performance was the result of a strike did not deprive the contractor of subsequently using the strike as grounds for excusable delay. (The facts of the case indicate that the contracting officer should have been aware of the strike, applying the principle of constructive knowledge.)

**"Compare** paragraph (c) of the default clause contained in ASPR § 8-707 (Rev. No. 9, 29 Jan. 1965) *with* paragraph (d) (1) of the default clause contained in ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965). The foreseeability requirement in construction contracts is applied in an objective manner. It need not be shown that the contractor actually expected a strike to occur but only that he reasonably should have foreseen it. **See** 39 Comp. Gen. 343 (1959).

<sup>42</sup>**See** *United States v. Brooks-Callaway Co.*, 318 U.S. 120 (1943). By dictum, the Supreme Court applied to a strike situation the principle that a contractor will be held to have foreseen difficulties in performance of a frequent and recurring nature. **See id.** at 123.

existence at the time the contract is awarded, the Comptroller General has ruled specifically that delay resulting from the strike cannot be considered as unforeseeable and, therefore, is not excusable delay.<sup>43</sup>

While application of the "unforeseeability" requirement in construction contracts appears simple enough, it is somewhat complicated by ASBCA decisions which have permitted relief from excess cost even though the strike was clearly foreseeable.<sup>44</sup> In these cases, the distinguishing feature has been that a nationwide steel strike was pending at the time the contracts were made. This fact was well-known to both the contractors and the government, and there was nothing the contractors could do to avoid the effect of the strike such as stockpiling supplies. Under these circumstances, the ASBCA refused to hold the contractors to the "unforeseeability" requirement and treated the strike as excusable delay. Although the ASBCA gave no detailed analysis of the basis for its decisions, it appears that it applied basic contract principles by finding that the parties had not contemplated or taken into consideration the effect on performance of a nationwide steel strike. Accordingly, there had been no "meeting of the minds" on this point and, as a matter of equity, the contractor was not held to have assumed the risk of performing during a strike of this nature.<sup>45</sup>

The default clause in supply contracts does not require that the cause of delay be unforeseeable, therefore a strike which delays performance even though foreseeable (and provided that

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**"See 39 Comp. Gen. 478 (1959).**

<sup>43</sup> See American Ball Bearing Corp., ASBCA No. 529, 26 April 1950; *accord*, Browning Bros., Inc., ASBCA No. 654, 9 Oct. 1950; Benlee Sporting Goods Mfg. Co., ASBCA No. 454, 23 Oct. 1950. At the time of these decisions, supply, as well as construction, contracts have a "foreseeability" requirement for excusable delay. For this reason, even though these cases all involved supply contracts, they are pertinent to this point.

<sup>44</sup> In similar circumstances, the Comptroller General has taken a different approach. A construction contractor was delayed in performance because of a nation-wide steel strike which was in existence at the time of award. Presumably, both the contractor and the government were aware of the strike at the time the contract was awarded. The Comptroller General applied the "foreseeability" requirement literally and refused to consider the strike as grounds for an extension of time. See 39 Comp. Gen. 478 (1959). This result can be reconciled with the cases cited in note 44 *supra* on the theory that here the contractor was aware of an actual strike in existence and the effect of it on his supplies. Acceptance of award under these circumstances is a clear assumption of the risk that shortages might develop.

it is beyond the contractor's control and without his fault or negligence) will constitute excusable delay.<sup>46</sup> However, a related problem that can arise in supply contract situations is the question of excusability when the delay results from a strike in existence at the time of award. Here, the issue is not foreseeability but rather whether the contractor has bargained to perform the contract notwithstanding any disability resulting from the existing strike. One view is that when a contractor with an existing strike at his plant accepts award of a contract and does not notify the contracting officer of the possibility of delay, he should be estopped from later claiming the strike as a ground for excusable delay.<sup>47</sup> A second theory for denying an extension of time under these circumstances is that when a contractor accepts award of a contract knowing that there is an existing strike at his plant, he warrants his capacity to perform within the terms of the contract.<sup>48</sup> Both of these views must be considered in light of the Comptroller General decision<sup>49</sup> which held that when the government awards a contract with knowledge that a contractor is experiencing a strike, resulting delay in performance is excusable.

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<sup>46</sup> 39 Comp. Gen. 478 (1959).

<sup>47</sup> The Comptroller General considered whether estoppel was appropriate when a contractor accepted award knowing that a strike was in existence at his plant, but determined that it was not, since the contracting officer had knowledge of the strike at time of award. See 35 Comp. Gen. 460 (1956). No case is reported in which the ASBCA used the term estoppel in these circumstances. However, in *Virco Mfg. Corp.*, ASBCA No. 1364, 28 Dec. 1964, 1965-1 B.C.A. para. 4585, it was held that a contractor who accepted award of a contract without notifying the contracting officer of a strike at his plant was not entitled to an extension of time, since the contractor could have made allowances for the effect of the strike. Although not called estoppel, the effect is the same.

"This theory is based on the ASBCA's refusal to consider lack of "know-how" as a basis for excusable delay. Illustrative of this is when a contractor bids for and accepts a contract but is later unable to perform on time because he lacks necessary skill, knowledge, or trained personnel. See *Gibson Mfg. Corp.*, ASBCA Nos. 1555 & 1556, 28 March 1955; *Richmond Engineering Co.*, IBCA No. 426-2-64, 1 Oct. 1964, 1965 B.C.A. para. 4465. When a contractor accepts a contract with knowledge of an existing strike at his plant, he is in no different position than a contractor who accepts a contract and knows (or should know) that he lacks the personnel to perform the contract within its terms. Accordingly, a contractor with a strike at his plant should be deemed to warrant or guarantee his ability to perform when he accepts a contract under these circumstances and should be denied an extension of time if he is unable to perform on time because of the strike.

<sup>48</sup> See 35 Comp. Gen. 460 (1956). The government awarded the contract with knowledge of the strike but with the expectation that it would be of short duration.



Based on the foregoing theories as modified by the Comptroller General's approach, it is suggested that when a supply contract is awarded to a contractor with an existing strike at his plant and the contracting officer has neither actual or constructive knowledge of the strike, any delay in performance should be considered inexcusable on the theory of either warranty or estoppel. Conversely, if the contracting officer has actual or constructive knowledge of the strike at time of award, delay resulting from the strike should be treated as excusable (provided there has been no specific promise by the contractor to perform notwithstanding the strike).

*2. Whether the Strike Was Beyond the Contractor's Control and Without His Fault or Negligence.*

Even when a contractor is able to establish that a delay in performance of a contract is the result of a strike, he will not be entitled automatically to an extension of time. In addition, it must be shown that the delay is beyond the contractor's control and without his fault or negligence before it will constitute excusable delay;:"

The cases concerning the question whether a strike is beyond a contractor's control and without his fault or negligence generally treat this as a single inquiry requiring a factual determination as in any other default situation. Illustrative of this approach is the ASBCA's decision in *Casket Forge, Inc.*<sup>51</sup> Here, the contractor failed to order in time steel needed to perform the contract. As a result, a nationwide steel strike prevented the contractor from obtaining necessary supplies, and performance was delayed. The ASBCA, looking to all the surrounding circumstances, determined that the contractor could have anticipated the steel shortage had he been more familiar with the status of the steel industry. However, the ASBCA found that the contractor was not, in fact, informed of the pending strike and was not negligent in being uninformed because of the infrequent occasions he had to order steel. For this reason, even though the contractor failed to notify the government of the problem or ask assistance and though he could have obtained the steel had he ordered earlier, the ASBCA held that the circumstances were beyond the con-

<sup>51</sup>See paragraph (c) of the default clause contained in ASPR § 8-707 (Rev. No. 9, 29 Jan. 1965), and paragraph (d)(1) of the default clause contained in ASPR § 8-709 (Rev. No. 9, 29 Jan. 1965).

<sup>52</sup>ASBCA No. 6205, 8 Aug. 1960, 1960-2 B.C.A. para. 2718.

tractor's control and without his fault or negligence.<sup>52</sup> Another example of how this test is applied is *Virco Mfg. Corp.*<sup>53</sup> In this case, the contractor was experiencing a strike at the time he accepted award. Later, due to the strike, the contractor was delayed in performance. This delay was held not to be excusable because the contractor, with knowledge of the possible delay in performance the existing strike could cause, should have made allowances for it. Accordingly, the delay was considered neither beyond his control nor without his fault or negligence.<sup>54</sup>

In the foregoing situations, the "control and fault or negligence" test of the default clause is a satisfactory means of determining whether delay resulting from a strike is excusable. The contracting officer can look to see whether the contractor should have anticipated strike-caused delay and made allowances for it by obtaining personnel or finding other sources of supply when normal sources are cut off. The problem area is when the strike-caused delay results from a labor dispute between the contractor

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<sup>52</sup> Other examples of excusable delay because the strike-caused delay was beyond the contractor's control and without his fault or negligence are: *George Sheaf & Co.*, ASBCA No. **4515**, 13 March 1958, 1958-1 B.C.A. para. **1661** (it was held to be excusable delay when a nation-wide strike was pending at time of award but neither the government nor the contractor could anticipate its duration or effect on performance); *Oregon Plywood Sales Corp.*, ASBCA No. **2901**, 6 Nov. 1956 (a general strike in the plywood industry prevented the contractor's subcontractor from furnishing necessary raw materials. The contractor attempted to obtain the contract item from other sources but was unable to do so. The delay was held excusable, even though some other government contractors were successful in obtaining plywood during the strike period).

<sup>53</sup> ASBCA No. **1364**, 28 Dec. 1964, 1965-1 B.C.A. para. **4585**.

<sup>54</sup> See also *Southern Steel Corp.*, ASBCA No. **6579**, 27 Feb. 1961, 1961-1 B.C.A. para. **2965**. Here, the contractor attempted to excuse nonperformance because an industry-wide strike had increased the cost of raw materials to the point where the contract was unprofitable. The ASBCA found that the contracting officer had granted the contractor reasonable extensions of time during the strike, that supplies were presently available, and therefore further delay was inexcusable. (The basis for dismissal was that the contractor's appeal was untimely, however, and not the inexcusability of delay.) The clearest statement of a contractor's responsibility when raw materials necessary for performance are affected by a strike is in *Ms. Comp. Gen. B-142529*, 5 July 1960: If needed supplies are reasonably available despite the unforeseen contingency, then the contingency cannot be relied upon as an excuse for failure to obtain them. There may be occasion, however, when the cost of obtaining supplies from other sources would place an unreasonable burden upon the contractor in relation to the contemplated cost of performance. In these circumstances, it is recognized that a reasonable limit must be placed upon the contractor's obligation to overcome the unforeseen obstacle.

and his employees which could not have been anticipated by the contractor and the effects of which, therefore, could not have been avoided by alternative methods of performance.

The first problem the contracting officer has is in determining when, if ever, such a strike is beyond a contractor's control. Since a contractor can settle a labor dispute any time by the simple expedient of acceding to the union's demands, it is arguable that a strike by a contractor's employees is never beyond his control. However, to hold the contractor to such a literal interpretation of the clause would be a manifest unfairness to him and conceivably affect his bargaining position. On the other hand, any other method of measuring the contractor's control over a labor dispute would necessarily involve the contracting officer in judging the merits of the dispute—something few contracting officers are qualified to do.

By the same reasoning, testing excusability of delay as a result of a strike on the basis of fault or negligence is equally difficult. Fault or negligence in this context would mean some violation of proper labor-management relations as prescribed by the LMRA. Once again, the contracting officer is placed in the position of determining the merits of a labor dispute which, as indicated previously, is beyond his training and expertise.<sup>55</sup>

Notwithstanding the difficulty of applying the "control and fault or negligence test" of the default clause in these circumstances, the ASBCA has considered the reasonableness of a contractor's labor practices in determining whether delay resulting from a strike is excusable. In *Bill Powell, d/b/a Bill's Janitor Service*,<sup>56</sup> the contractor had made changes in his pay procedure which his employees felt to be unfair and in protest against which they went on strike. For this interruption of performance (and because of some prior incidents of unsatisfactory performance), the contracting officer terminated the contractor for default. The ASBCA, in ruling that the termination was improper, considered specifically the question whether the strike was beyond the contractor's control and without his fault or negligence. It determined that the contractor's action in changing his pay procedure was within his managerial discretion and was reasonable. There-

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<sup>55</sup>This also raises the question whether any federal agency other than the NLRB should be concerned with the control and prevention of unfair labor practices.

<sup>56</sup>ASBCA Nos. 10345 & 10393, 16 June 1965, 1965-2 B.C.A. para. 4916.

fore, the ASBCA concluded that the work stoppage was beyond the contractor's control and without his fault or negligence and, as such, was excusable delay.

As can be seen, the ASBCA's approach was literal application of the excusable delay provisions, and there was no apparent reluctance to judge the contractor's labor practices. For reasons previously discussed, this is a highly questionable procedure. However, based on *Bill Powell* it appears that in the appropriate circumstances the contracting officer must attempt to evaluate the merits of a labor dispute in determining whether a strike is beyond a contractor's control and without his fault or negligence.<sup>57</sup>

### 111. LABOR LAW AND GOVERNMENT PROCUREMENT

In order to determine the effect of labor disputes on government procurement,<sup>58</sup> it is necessary to examine the Labor-Management Relations Act and the decisions of the federal courts and the National Labor Relations Board which have interpreted it. In so doing, three basic questions must be considered: (1) What is the status of federal agencies under the LMRA? (2) What is the status of government contractors and their employees under the LMRA? (3) How may activities of a federal agency be distinguished from those of a government contractor for purposes of applying the LMRA?

#### A. THE LABOR-MANAGEMENT RELATIONS ACT OF 1947

On 23 June 1947, Congress passed over the President's veto the Labor-Management Relations (Taft-Hartley) Act.<sup>59</sup> This legislation was the result of intensive congressional interest in the area of labor relations, which was then an acute national problem.<sup>60</sup>

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<sup>57</sup> This decision may be misleading in that the ASBCA did not condemn the contractor's labor practices or in effect punish the contractor by charging excess cost for his delay in performance. It is believed that this question will be open until the ASBCA specifically labels a contractor's labor practices as unfair and finds delay inexcusable for that reason.

<sup>58</sup> In this context, government procurement includes the procuring agency, the installation on which the agency is located, and contractors doing business with the agency.

<sup>59</sup> 61 Stat. 136 (1947), 29 U.S.C. § 141 (1964).

<sup>60</sup> Immediately following World War II, union activity increased in an alarming fashion resulting in several nation-wide strikes in various industries. Perhaps the most memorable of these was the coal miners strike under the leadership of John L. Lewis, which occurred during this period. The LMRA was largely a product of this troubled time.

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The clearest statement of the purpose of this legislation is contained in the LMRA itself:

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

This intent of Congress is reflected in three basic provisions:

(1) Employees are guaranteed the right to self-organization, to join or form labor unions, and to engage in concerted action for the purpose of collective bargaining, or to refrain from any of these activities.<sup>62</sup>

(2) Unfair labor practices are defined for both management and employees. Employer unfair labor practices are described as interfering with or restraining the right of employees to organize and bargain collectively, using discriminatory hiring practices for the purpose of encouraging or discouraging membership in a union, firing an employee because he filed a complaint, or refusing to bargain collectively.<sup>63</sup> Employee unfair labor practices are defined as restraining or coercing fellow employees in the exercise of their right to organize, engaging in a secondary boycott,<sup>64</sup> or

<sup>61</sup> LMRA § 1(b), 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1964).

<sup>62</sup> See LMRA § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

<sup>63</sup> See LMRA § 8, 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (1964).

"Historically, a boycott is a refusal to have dealings with an offending person. For example, to induce customers to refrain from purchasing from an offending grocery store is to organize a primary boycott. To persuade grocery stores not to buy particular products is also a primary boycott. However, in each case economic pressure is levelled only at the offending person—in terms of labor cases, at the employer involved in the labor dispute.

The element of "secondary activity" is introduced when there is a refusal to deal with one who has dealings with the offending person. For example, there is a secondary boycott when housewives refuse to buy at any grocery store which deals with a particular supplier. For members of the Plumbers Union to refuse to work for any contractor who buys from the United States Pipe Company is, strictly speaking, a secondary strike but is called a secondary boycott and is the only kind of secondary activity which was prohibited under the Taft-Hartley Act. Thus, there are two employers in every secondary boycott resulting from a labor dispute. See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959).

refusing to bargain collectively.<sup>65</sup>

(3) The NLRB is given the responsibility of preventing unfair labor practices. To perform this function, it is empowered to issue cease and desist orders to any person engaged in an unfair labor practice and to take other affirmative action which would effectuate the policy of the LMRA.<sup>66</sup>

## B. *THE STATUS OF FEDERAL AGENCIES, GOVERNMENT CONTRACTORS, AND EMPLOYEES OF GOVERNMENT CONTRACTORS UNDER THE LMRA*

### 1. *Federal Agencies.*

The LMRA purports to apply to and protect employers, employees, and the public.<sup>67</sup> In clarifying precisely who is intended to be included in these categories, the Act contains definitions of "employer,"<sup>68</sup> "employee,"<sup>69</sup> and "persons."<sup>70</sup> Since a federal agency, as a governmental instrumentality, inherently cannot be an employee under the LMRA,<sup>71</sup> it is necessary to consider only the LMRA's definition of "employer" or "persons" to determine whether it applies to a federal agency.

The LMRA clearly defines employer as "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . . ."<sup>72</sup> Consequently, it is not surprising that there have been relatively few cases involving allegations that a federal agency was an "employer" within the purview of the LMRA. The NLRB has consistently held that governmental

<sup>65</sup> See LMRA § 8(b)(3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1964).

<sup>66</sup> See LMRA § 10, 61 Stat. 164 (1947), as amended, 73 Stat. 544 (1959), 29 U.S.C. § 160 (1964).

<sup>67</sup> LMRA § 1(b), 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1964).

<sup>68</sup> LMRA § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1964).

<sup>69</sup> LMRA § 2(3), 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1964).

<sup>70</sup> LMRA § 2(1), 61 Stat. 137 (1947), 29 U.S.C. § 152(1) (1964).

<sup>71</sup> The definition of "employee" in the LMRA is expressed in terms of individuals and contemplates a personal relationship between individual employees and employers. It has been held that the word "employee" as used in the LMRA was intended by Congress to mean someone who works for another. *NLRB v. Steinberg*, 182 F.2d 850 (5th Cir. 1950). Since governmental agencies are not individuals as contemplated by the LMRA, they cannot be "employees." Furthermore, the rights and duties of "employees" described in the LMRA have no meaningful application to a governmental body.

<sup>72</sup> LMRA § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1964).

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agencies are not "employers" within the meaning of the LMRA.<sup>73</sup> The court cases involving this question have been concerned primarily with determining which agencies qualified as exempted governmental bodies.<sup>74</sup> In addition, the decisions have uniformly held that the intent of the LMRA is to not recognize the existence of the right of collective bargaining in public employment.<sup>75</sup>

Based on these decisions, it is safe to conclude that the LMRA does not apply to federal agencies as "employers," nor does it grant federal employees the right to collective bargaining. Therefore, if the LMRA is to apply to a federal agency, it is necessary to find that such an agency is a protected "person."

The NLRB's initial position on this question was established in the *Al J. Schneider Company*<sup>76</sup> and *Sprys Electric Company*<sup>77</sup> decisions. Both of these cases involved charges that strikers were conducting a secondary boycott which involved governmental agencies.<sup>78</sup> The NLRB quickly determined that these agencies were not employers covered by the LMRA and, after noting that the Act's definition of "person" did not specifically include governmental agencies, concluded neither were they protected persons.<sup>79</sup> The NLRB reasoned that had Congress intended to include govern-

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<sup>73</sup> See *Al J. Schneider Co.*, 87 N.L.R.B. 99 (1949); *Sprys Elec. Co.*, 104 N.L.R.B. 1128 (1953); *Peter D. Furness Elec. Co.*, 117 N.L.R.B. 437 (1957).

<sup>74</sup> See *NLRB v. American Nat'l Trust & Sav. Ass'n*, 130 F.2d 624 (9th Cir. 1942). A national bank claimed governmental immunity but was found to be a covered "employer" because it was a privately-owned corporation, privately managed and operated in the interest of its stockholders. It was pointed out that the United States did not create the bank but merely enabled it to be created. The fact that national banks are subject to strict regulation and supervision and that they sometimes aid in carrying out fiscal policies of the government was noted but held to be incidental and not adequate justification to grant a national bank governmental status. Conversely, a river dam authority was held to be a governmental agency and not an "employer" under the LMRA on the basis that it was engaged in a public purpose and conducting a state function which could have been accomplished by an existing state board or office. See *Local 976, Electrical Workers v. Grand River Dam Authority*, 292 P.2d 1018 (Okla. 1956).

<sup>75</sup> See, e.g., *Local 976, Electrical Workers v. Grand River Dam Authority*, 292 P.2d 1018 (Okla. 1956).

<sup>76</sup> 87 N.L.R.B. 99 (1949).

<sup>77</sup> 104 N.L.R.B. 1128 (1953).

<sup>78</sup> It is significant to note that in *Sprys* the governmental agency involved was the U. S. Army Corps of Engineers.

<sup>79</sup> The term "person" is defined in the LMRA as "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." 61 Stat. 137 (1947), 29 U.S.C. § 152(1) (1964).

mental agencies within the definition of “person” it would have expressly done so. Furthermore, the NLRB took the view that the thrust of the LMRA was aimed at private industry with the purpose of providing a scheme of correlative rights and duties for private individuals and organizations and was not intended to regulate public employment.

This interpretation prevailed until the Supreme Court’s decision in *Teamsters Union v. New York, New Haven & Hartford R.R.*<sup>80</sup> In that case, the Union was charged with conducting a secondary boycott against the Railroad. The Union argued, *inter alia*, that the LMRA did not apply to this situation because railroads had not been specifically included in the definition of protected persons.<sup>81</sup> The Supreme Court held that the LMRA’s definition of “person” was not exclusive and that organizations not specifically listed were covered. Consistent with this interpretation, the Supreme Court held that the failure of Congress to specify railroads as a “person” did not disqualify such organizations from the LMRA’s protection from secondary boycotts and that a railroad may, therefore, seek relief from an unfair labor practice.

The significance of this decision was considered in *Peter D. Furness Electric Company*.<sup>82</sup> Here, a county had awarded the electrical work for a new airport to a nonunion contractor. The electrician’s union, in response, conducted a classic example of a secondary boycott. In reversing its earlier narrow interpretation of the term “person,” the NLRB concluded that the Supreme Court had rejected both the view that the definition in the LMRA was intended to be exclusive and the contention that the purpose of the LMRA was directed only at industry. For this reason, the NLRB specifically overruled *Schneider* and *Sprys* and held that if railroads were protected by the LMRA *a fortiori* so were governmental agencies.<sup>83</sup>

The Supreme Court had an opportunity to review the NLRB’s new position in *Plumbers Local 298 v. County of Door*.<sup>84</sup> In this

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<sup>80</sup>350 U.S. 155 (1956).

<sup>81</sup> Separate legislation covers labor relations in the railroad industry, therefore, railroad companies are not employers covered by the LMRA.

<sup>82</sup> 117 N.L.R.B. 437 (1957).

<sup>83</sup> The NLRB was careful to emphasize that this decision in no way altered its view that political subdivisions are not employers covered by the LMRA. *Id.* at 441 n.4.

<sup>84</sup> 359 U.S. 354 (1959).



case, the County had obtained injunctive relief from secondary boycott picketing at a courthouse construction site by obtaining a cease and desist order from a state court. The union appealed, arguing that the NLRB, not the state court, had jurisdiction over the dispute. The County took the position that as a political subdivision it was not covered by the LMRA. The Supreme Court, following its decision in *New York, New Haven, R.R.*, held that the definition of "person" in the LMRA is not exclusive. The Court then reasoned that there was no difference in the position of a railroad and a county, and, therefore, jurisdiction over the labor dispute properly belonged to the NLRB.<sup>85</sup>

The issue of a federal agency's status as a "person" covered by the LMRA was specifically raised in *Atomic Projects & Production Workers*.<sup>86</sup> In this case, the Atomic Energy Commission and the U.S. Army Corps of Engineers were being subjected to a secondary boycott. Basing its decision on *Furness*, the NLRB held that both these agencies were "persons" covered by the LMRA and that as such they were entitled to protection from secondary boycott activity.

## 2. Government Contractors and Their Employees.

In order to determine the applicability of the LMRA to government contractors and their employees, two inquiries must be made. First, it must be ascertained whether a contractor acquires governmental exemption as an "employer" under the LMRA as a result of his relationship with the government. Secondly, because the activities of a contractor are frequently difficult to distinguish from those of the government, it is necessary to examine the method used by the NLRB to distinguish the two for purposes of applying the LMRA.<sup>87</sup>

Within the framework of the LMRA, "employer" and "em-

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<sup>85</sup> The Supreme Court noted the NLRB's reversal of the *Schneider* and *Sprys* cases with tacit approval.

<sup>86</sup> 120 N.L.R.B. 400 (1958).

<sup>87</sup> This inquiry is relevant primarily to personal services contracts such as janitorial services, concessionaires, and similar activities. Since these services are usually rendered on or near a federal installation, the question during labor disputes often is whether the employees performing these services are those of the government or of a private employer. This is in sharp contrast with the situation normally found in supply or construction contracts. Here, the employees either work on premises owned by the contractor or are so clearly employed by him that there is no question of government control or the applicability of the LMRA.

ployee” are given their broadest generic meaning. An example of this is the definition of employee: “The term ‘employee’ shall include *any* employee . . . .” (Emphasis added.)<sup>88</sup> One of the few exceptions to this general proposition is that governmental agencies as employers and their employees are specifically excluded from the LMRA’s coverage.<sup>89</sup> This exception raises the question whether a contractor who does business with a federal agency thereby acquires the same exemption.

The NLRB has approached the question by first determining whether the contractor is an independent government contractor or an agent of the government. If he is determined to be an independent contractor, he will be treated as any other employer with none of the immunities of the federal agency.<sup>90</sup> In addition, persons employed by the independent contractor will be entitled to all employee rights guaranteed by the LMRA.<sup>91</sup> Conversely, if the NLRB finds that the contractor is an agent of the federal agency, the employees involved will be considered employees of the government and, as a result, excluded from the LMRA’s coverage.<sup>92</sup> The real question, therefore, is that of knowing when a contractor will be considered an independent contractor, as opposed to an agent of the government. In answering this question, it is helpful to consider a series of decisions by the NLRB which furnish a reasonably good yardstick in making this distinction.

In *National Food Corp.*,<sup>93</sup> the Corporation was responsible for managing the restaurant facilities in the Pentagon under the auspices of the Pentagon Post Restaurant Council. When a dispute developed between the Corporation and the employees working in the restaurant system, the Corporation took the position that it was merely an agent of the government and, as such, was not subject to the LMRA. In considering this argument, the NLRB found that the Corporation had the responsibility of furnishing, employing, governing, disciplining, and discharging the employees of the restaurant system in the Pentagon. Based on this finding, and notwithstanding the fact that the Corporation’s authority in virtually every respect was subject to review and

<sup>88</sup> LMRA § 2(3), 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1964).

<sup>89</sup> LMRA § 2(2)–(3), 61 Stat. 137 (1947), 29 U.S.C. § 152(2)–(3) (1964).

<sup>90</sup> See *American Smelting & Ref. Co.*, 92 N.L.R.B. 1451 (1951).

<sup>91</sup> See *Geronimo Serv. Co.*, 129 N.L.R.B. 366 (1960).

<sup>92</sup> See *Roane-Anderson Co.*, 95 N.L.R.B. 1501 (1951).

<sup>93</sup> 88 N.L.R.B. 1500 (1950).

approval by government officials, the NLRB held that the Corporation had "an extensive area of effective control over labor policies and over the basic subjects of collective bargaining"<sup>94</sup> and was, therefore, an employer within the meaning of the LMRA.

In *American Smelting & Refining Co.*,<sup>95</sup> the Company made a similar claim for federal immunity. The facts showed that all employee salaries were paid out of government funds and that the Company's authority over plant employees was subject to review by the federal authorities. Nevertheless, the NLRB found that the Company directly hired all employees and that there remained with the Company at all times "an area of effective control over labor relations at the plant."<sup>96</sup> As a result, the NLRB held the Company to be an independent contractor doing business with the government and an "employer" under the LMRA.

In *Geronimo Service Co.*,<sup>97</sup> the Company argued that it was an agent of the government as a result of a provision in its contract with the government which permitted the contracting officer to direct dismissal of employees when he believed this to be in the best interest of the government. The Company contended that this provision gave the contracting officer final control over all employees. The NLRB found that the Company hired and discharged personnel for its own reasons and convenience and set the wages and other terms of employment. Furthermore, the authority of the contracting officer over the employees was limited to specific circumstances which only to a limited extent modified the Company's complete control over its employees.<sup>98</sup> Accordingly, the NLRB concluded that the control of the contracting officer over the employees was not sufficient to constitute the Company an agent of the government and, therefore, the Company was an employer covered by the LMRA.

*Roane-Anderson Company*<sup>99</sup> is the single decision found in which the NLRB ruled that employees claiming rights under the LMRA

<sup>94</sup> *Id.* at 1501.

<sup>95</sup> 92 N.L.R.B. 1451 (1951).

<sup>96</sup> *Id.* at 1452.

<sup>97</sup> 129 N.L.R.B. 366 (1960).

"The contract provided: 'The Contractor will be guided by, and will act in accordance with, the direction and request of the Contracting Officer, whenever the dismissal of individual personnel from the performance of said services shall be deemed by the Contracting Officer to be necessary, or advisable in the best interest of the Government, to maintain the standards of personal hygiene and workmanship.'" *Id.* at 368.

<sup>98</sup> 95 N.L.R.B. 1501 (1951).

were, in fact, employees of the government. The issue arose when a union attempted to organize and represent the security police for the Atomic Energy Commission (AEC) at Oak Ridge, Tennessee. The union took the position that the police were employees of the independent government contractor performing maintenance and operations for the AEC and were not employees of the AEC. Thus, the union argued that the police were entitled by the LMRA to organize. The NLRB found that the AEC had complete control over the hiring, discharge, pay, and discipline of the police, and that the government contractor performed only a few administrative functions, such as paying the police, for which the contractor was reimbursed and compensated by the government. Because of the degree of control by the AEC over the employee status of the police, the NLRB concluded that they were government employees and, as such, had no organizational rights under the LMRA.

These decisions reveal that, in distinguishing between a government contractor and agent, the fact that both the federal agency and the contractor have some control over the employee's status is not determinative. Nor does the NLRB use the traditional tests for determining an agency relationship, such as control over the manner of performance. Rather, the NLRB looks to see which party has primary control or dominion over the employer-employee relationship. Should the NLRB find that the federal agency has primary control, the employees will not be covered by the LMRA. On the other hand, if the contractor is found to have primary control, both he and his employees will be covered.

### *C. THE ROLE OF THE NLRB IN RESOLVING LABOR DISPUTES INVOLVING GOVERNMENT CONTRACTORS*

Labor disputes involving government contractors and their employees may be settled by mutual agreement of the parties or by mediation by federal or, in isolated cases, state agencies specifically provided for this purpose.<sup>100</sup> Short of a friendly settlement, however, labor disputes resulting from alleged unfair labor practices are resolved by the NLRB. For this reason, it is valu-

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<sup>100</sup> Title II of the LMRA created the Federal Mediation and Conciliation Service. *See* 61 Stat. 153 (1947), 29 U.S.C. § 172 (1964). It is an independent agency of the executive branch of the government whose purpose is to provide facilities and assistance for conciliation, mediation, and voluntary arbitration of labor disputes. Various states have enacted similar laws providing for mediation agencies on a state level.

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able briefly to consider the scope of the NLRB's activity in preventing unfair labor practices and, in greater detail, to examine the standards used by the NLRB in determining when jurisdiction will be asserted over a labor dispute involving a government contractor and his employees. This will provide a useful foundation for the next part, which will be concerned with the protection that the LMRA affords a federal agency as a "person" and the availability of the NLRB in guaranteeing that this protection is not denied.

### 1. *The National Labor Relations Board.*

The express purpose of the NLRB is to prevent unfair labor practices affecting commerce.<sup>101</sup> To accomplish this purpose, the NLRB functions much like a court, although technically it is an administrative agency. Its procedures are contained in the *National Labor Relations Board, Rules and Regulations and Statements of Procedure*,<sup>102</sup> which permit any person, as defined by the LMRA, to charge that an unfair labor practice is being committed. Such a charge normally contains the name of the person making the charge, the name and address of the one against whom the charge is made, and a concise statement of the facts constituting the alleged unfair labor practice affecting commerce.<sup>103</sup> A complaint is then issued by authority of the NLRB to the person alleged to have committed the unfair labor practice advising him of the nature of the charge and giving him an opportunity to file an answer or appear in person at an initial hearing usually conducted by a single agent of the NLRB.<sup>104</sup> The results of the hearing are reduced to writing and presented to the NLRB, which may rule on the charge on the basis of the written record or, at its discretion, take further testimony and hear argument.<sup>105</sup>

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"The unfair labor practices the NLRB is designed to prevent are those spelled out in the LMRA. See notes 63-65 *supra* and accompanying text. "Commerce" is defined in the LMRA as "trade, traffic, commerce, transportation, or communication among the several states" § 2(6), 61 Stat. 138 (1947), 29 U.S.C. § 152(6) (1964). "Affecting commerce" is defined as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." LMRA § 2(7), 61 Stat. 137 (1947), 29 U.S.C. § 152(7) (1964).

<sup>101</sup> Series 8, § 102.9 (rev. 1965) [hereafter cited as NLRB RULES].

<sup>102</sup> "NLRB RULES § 102.12.

<sup>103</sup> LMRA § 10(b), 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1964).

<sup>104</sup> LMRA § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964). The normal procedure is for a single agent of the NLRB (called a trial examiner)

Should the NLRB conclude that the person charged is in fact engaged in an unfair labor practice, it has the authority to issue a cease and desist order and take other affirmative action which will effectuate the policies of the **LMRA**.<sup>106</sup> If the charge is unsupported by the evidence, it will be **dismissed**.<sup>107</sup> In the event the NLRB issues a cease and desist order or any other order and the person to whom it is directed fails to comply, the NLRB may petition the federal circuit court of appeals having jurisdiction over the place in which the unfair labor practice is occurring. The court of appeals may order whatever temporary relief appears appropriate and thereafter has jurisdiction to reconsider the case. **As** a result of this procedure, the court of appeals may enter a decree enforcing, modifying, or setting aside in whole **or** in part the order of the **NLRB**.<sup>108</sup>

Decisions of the NLRB may be appealed by requesting review by the federal circuit court of appeals having jurisdiction over the dispute. The court of appeals has the same authority in these circumstances as it has when the NLRB petitions for an enforcement order.<sup>109</sup>

## 2. *Jurisdiction of the NLRB over Labor Disputes Involving Government Contractors.*

The NLRB has jurisdiction to prevent any person from engaging in an unfair labor practice which affects **commerce**.<sup>110</sup> This grant of authority was held by the Supreme Court in *NLRB v. Reliance Fuel Oil Corp.*<sup>111</sup> to mean that Congress intended to and did vest in the NLRB the fullest jurisdictional breadth constitutionally permissible under the commerce clause. Within this

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to conduct a hearing and prepare an initial decision. This decision includes findings of facts, conclusions, and the bases or reasons therefor. It is filed with the **NLRB**, and copies are served on the parties. They are then permitted to file exceptions to or briefs in support of the trial examiner's decision. If no timely or proper exceptions are filed, the findings, conclusions, and recommendations of the trial examiner automatically become the decision of the **NLRB**. If timely and proper exceptions are filed, the **NLRB** may decide the matter on the record, or after oral argument, or may reopen the record and receive further evidence. **NLRB RULES §§ 102.45, 102.46, and 102.48.**

<sup>106</sup> **An** example of other affirmative action would be ordering reinstatement of an employee with or without back pay. **See LMRA § 10 (c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).**

<sup>107</sup> *See Id.*

<sup>108</sup> *See LMRA § 10(e), 61 Stat. 147 (1947), 29 U.S.C. § 160(e) (1964).*

<sup>109</sup> *See LMRA § 10(f), 61 Stat. 148 (1947), 29 U.S.C. § 160(f) (1964).*

<sup>110</sup> *LMRA § 10 (a), 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1964).*

<sup>111</sup> 371 U.S. 224 (1963).

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framework, the Court found that Reliance, even though its fuel distributing operations in isolation appeared local in nature, had sufficient "interlacings" of business across state lines to be covered by the LMRA and to come within the NLRB's jurisdiction.<sup>112</sup> Notwithstanding the breadth of its granted jurisdiction, the NLRB has never asserted it to the fullest extent, probably because of the impossible caseload this would mean. Rather, the NLRB has approached the question by establishing jurisdictional standards for each type or category of business. Generally, these standards require that the employer in the labor dispute be engaged in or affect interstate commerce and that he have a prescribed volume of business.<sup>113</sup> Should the labor dispute involve more than one employer, as in a secondary boycott situation, the NLRB will look to the business of each involved employer, and, if any one meets the jurisdictional standard for his category of business, jurisdiction will be assumed over all parties involved in the dispute."

The NLRB has experienced some difficulty in arriving at an appropriate standard for contractors engaged in business related to the national defense.<sup>115</sup> Initially, the sole requirement was that the contractor be engaged in or affect interstate commerce and that his enterprise have a substantial effect on national defense.<sup>116</sup> In 1954, however, the NLRB announced that it would assume jurisdiction in a labor dispute involving a government

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<sup>112</sup> See *id.* at 224-25. The Court found that Reliance, a local distributor of fuel oil, purchased a substantial amount of fuel oil and related products from Gulf Oil Corporation, a supplier concededly engaged in interstate commerce.

<sup>113</sup> An example is the standard established for retail enterprise. The NLRB has ruled that it will take jurisdiction in labor disputes in this industry only if the employer is engaged in interstate commerce and does a gross volume of business of at least \$500,000 per annum. See *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 88 (1958).

<sup>114</sup> See *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769 (1954); *Bondi's Mother Hubbard Mkt.*, 118 N.L.R.B. 130 (1957).

<sup>115</sup> Although nothing in the reported decisions explains the reasons for this difficulty, it appears that the national defense aspect of labor disputes involving government contractors does not fit easily into the NLRB's self-determined jurisdictional scheme. As previously discussed, the NLRB has geared its jurisdiction to business volume and interstate commerce, thereby hoping to keep from becoming bogged down with insignificant cases. The problem with this approach with government contractors is that a small business contractor may be producing a critical item needed for national defense. Thus, a labor dispute involving such a contractor might be of utmost importance but not covered by NLRB jurisdiction.

<sup>116</sup> See *Westport Moving & Storage Co.*, 91 N.L.R.B. 902 (1950).

contractor only when it could be shown that the contractor was engaged in or affected interstate commerce and that he provided goods or services directly related to the national defense pursuant to government contracts, including subcontracts, in the amount of \$100,000 or more a year.<sup>117</sup>

These standards were applied until the NLRB's decision in *Ready Mix Concrete & Materials, Inc.*<sup>118</sup> in 1958. In this decision, the NLRB specifically eliminated the requirement that a government contractor's operations be directly related to the national defense and that his volume of business with the government be \$100,000 or more. Substituted therefor was the requirement that the contractor's operations exert a substantial impact on the national defense, irrespective of whether the contractor satisfied any of the NLRB's other jurisdictional requirements. Nothing in the decision specifically accounts for this change, which was in effect a return to the original, more relaxed jurisdictional standards for government contractors. The reason given without further explanation was that the relaxed standards better effectuated the intent of Congress—the same reason given for making the standards more rigid a few years earlier. At best, all that can be concluded is that on an empirical basis the NLRB will change jurisdictional standards as it finds it necessary in order effectively to perform its function. The fact that the standards announced in *Ready Mix Concrete & Materials, Inc.*, have now been in effect for over eight years indicates that the NLRB has found a satisfactory standard for government contractors which is not likely to be changed in the foreseeable future.<sup>119</sup>

This standard has been applied in a literal fashion by the NLRB, and decisions concerning jurisdiction over government contractors have been relatively easy to follow. Illustrative of this is the case<sup>120</sup> in which the NLRB assumed jurisdiction over a

<sup>117</sup> *Maytag Aircraft Corp.*, 110 N.L.R.B. 594, 596 (1954). The reason given by the NLRB for the change was that the new standards better effected congressional intent. No explanation for this assertion was given, and it can only be assumed that the NLRB was exercising its administrative discretion in defining jurisdictional standards as it believed appropriate.

<sup>118</sup> 122 N.L.R.B. 318 (1958).

<sup>119</sup> Although the jurisdictional standard for government contractors refers to national defense only, the NLRB has found jurisdiction over a labor dispute involving a contractor working for the Department of Agriculture, using essentially the same standard as for national defense contractors. *See Canal Marais Improvement Corp.*, 129 N.L.R.B. 1332 (1961).

<sup>120</sup> *See Carteret Towing Co.*, 135 N.L.R.B. 975 (1962).



dispute involving a towing company operating tug boats which assisted naval vessels. The NLRB had little trouble in finding that the towing company was engaged in interstate commerce and that its operations exerted a substantial impact on national defense. Conversely, jurisdiction was declined over a labor dispute involving a laundry servicing Fort McClellan, Alabama, even though the laundry was located in Georgia and was clearly engaged in interstate commerce. The NLRB ruled that laundry service did not substantially affect the national defense.<sup>121</sup>

In conclusion, it must be kept in mind that the jurisdictional standards for government contractors discussed above are not the only standards which might be considered by the NLRB in determining whether it will assume jurisdiction over a labor dispute involving a government contractor. An example of this is *Westside Pattern Works*.<sup>122</sup> It was argued in this case that Westside was a business over which the NLRB had jurisdiction because of the substantial impact on national defense it exerted. It was found, however, that Westside's connection with national defense was simply that it furnished parts to prime government contractors and these parts did not appear vital to any of the end items being furnished the government. The NLRB then examined the facts to determine whether Westside met any other jurisdictional standard based on its size or volume of business. Finding none, the NLRB concluded that it had no jurisdiction because Westside's impact on national defense was vague and indefinite and no other standard applied. As can be seen, the NLRB does not look only to the impact a contractor has on national defense but, if necessary, to all aspects of his enterprise to see if any other jurisdictional standards apply. Accordingly, when attempting to determine whether a dispute involving a government contractor is within the NLRB's jurisdiction, it is appropriate to look both to the impact the contractor has on national defense and to any other NLRB jurisdictional standard which might apply.

### IV. THE PROBLEM OF PICKETING AT A FEDERAL INSTALLATION

In recent years, several articles have appeared in national news magazines speculating on the impact of a transportation

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<sup>121</sup>See *Rome Laundry, Inc.*, 51 LRRM 1583 (1962).

<sup>122</sup>150 N.L.R.B. 1730 (1965).

strike on a large metropolitan area such as New York City. These articles point out that most large cities have only a few days' supply of many essential items and that a strike of even a brief duration would result almost immediately in critical shortages. A prolonged strike could have many more serious consequences.

It is interesting to compare this situation with the effect that a strike at a federal installation could have. Consider the situation where a large construction contract has been awarded for the erection of a new hospital on a military post. Because of a labor dispute over pay scales, the employees of the construction contractor walk out and, in protest, set up pickets at all post gates. Shortly after the pickets have begun patrolling the gates, trucks loaded with subsistence supplies and driven by members of the Teamsters Union arrive at the post. They refuse to cross the picket lines and leave without making their deliveries. Later, employees of the contractor responsible for waste removal and janitorial services for the post, also members of a union, are persuaded by the picketing employees to honor the picket line and to refuse to report for work until the dispute is resolved.

This is an example of how picketing at a federal installation resulting from a labor dispute involving a single government contractor could enmesh numerous other government contractors who perform important services for the installation. As in the case of a large city being cut off from outside sources, the operations of the post could suffer from both lack of supplies and delay in vital work. Moreover, many federal installations, such as military posts, are densely populated communities with all the needs and requirements of any urban area. The inconvenience that picketing might cause military personnel and their families stationed on the post cannot be ignored.

In anticipation of this problem, the remainder of this article will be devoted to a consideration of the legality of picketing at federal installations and the means available to mitigate the impact of picketing on the activities of the installation.<sup>123</sup> This will involve first an examination of the interrelation of secondary boycotts and the use of reserved gates to avoid the effects of a strike by neutral persons. With this as a foundation, discussion

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<sup>123</sup> As a matter of technique, this problem will be discussed on the assumption that the federal installation being picketed is a military post. However, unless indicated otherwise, the legal principles developed will be applicable to any federal agency or installation.

will follow of the use of reserved gates by military authorities for this purpose.

### A. PRIMARY PICKETING

The rights to strike and to picket are rights guaranteed to employees by the LMRA.<sup>124</sup> Picketing is activity protected by the provisions in the LMRA making it an unfair labor practice to interfere with the exercise by employees of their rights under the LMRA or to discriminate against employees for union activity.<sup>125</sup> Lawful picketing—called primary picketing—is the patrolling of a given area, plant site, or gate by one or more persons in order to accomplish the varied purposes of assuring that striking workers stay on strike, discouraging others from taking over the strikers' jobs, advertising the dispute, and in general encouraging the public to take the side of the strikers.<sup>126</sup> The right to picket, however, is not an absolute right and is subject to injunction, *inter alia*, if fraud or violence are involved<sup>127</sup> or if the picketing amounts to an unfair labor practice.<sup>128</sup>

Of primary importance among the unfair labor practices from which injunctive relief is available is secondary boycott activity.<sup>129</sup>

<sup>124</sup> LMRA § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964), provides: "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining.*" (Emphasis added.)

<sup>125</sup> See LMRA § 8(a)(1), (3), 61 Stat. 140 (1947), *us amended*, 73 Stat. 525 (1959), 29 U.S.C. § 158(a)(1), (3) (1964). The LMRA protects an employee's right to picket by making it an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights granted them by the LMRA, and to discriminate in regard to hire or tenure with the purpose of encouraging or discouraging membership in any labor organization.

<sup>126</sup> See LRX § 44 at 535 (1963).

<sup>127</sup> Anti-Injunction Law (Norris-LaGuardia Act) § 4(e), 47 Stat. 71 (1932), 29 U.S.C. § 104(e) (1964).

<sup>128</sup> See LMRA § 8(b), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964).

<sup>129</sup> The secondary boycott provision of the LMRA is contained in 73 Stat. 542 (1959), *amending* 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1964). It provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

" . . . .

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, material, or commodities or to perform any services; or (ii) to

A literal interpretation of the secondary boycott provisions of the LMRA would make any involvement of neutrals an unlawful secondary boycott.<sup>130</sup> This, however, is not the interpretation given the LMRA by the Supreme Court. Rather, the secondary boycott provisions have been held to reflect the dual congressional intent of preserving the right of employees to bring pressure on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies in which they are not involved.<sup>131</sup> In balancing these two interests, the Supreme Court has ruled that the secondary boycott provisions of the LMRA were not intended to interfere with ordinary strike privileges,<sup>132</sup> which include using persuasion, including picketing, not only on the primary employer and his employees but also on secondary employers who are customers or suppliers of the primary employer.<sup>133</sup> Furthermore, there must be deliberate action on the part of the union to involve secondary employers. If secondary employees of their own volition honor picket lines without being induced to do so by the union, the union will not be guilty of conducting a secondary boycott.<sup>134</sup>

threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

“ . . .

“(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. . . .”

<sup>130</sup> In secondary boycott cases, the employer with whom the union has the labor dispute and who is in a position to grant or deny union demands is commonly called the “primary employer.” Those neutral employers who become a party to the dispute through their business dealings with the primary employer and are under pressure to discontinue such dealings are called “secondary employers.”

<sup>131</sup> See *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951).

<sup>132</sup> See *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

<sup>133</sup> See *NLRB v. Local 294, Teamsters*, 284 F.2d 887, 889 (2d Cir. 1960). Picketing which induces employees of neutral employers to respect a picket line and thereby disrupt the struck employer’s business is not a secondary boycott. Only when the object of the picketing is to induce neutral employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck employer does the picketing become a secondary boycott. *Id.*

<sup>134</sup> See *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 98 (1958).

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Since employees of independent government contractors have all the rights of any other employee,<sup>135</sup> they too have the right to conduct lawful primary picketing as described above. As a result, and in spite of a natural repugnance to the idea that strikers have a right to interfere with national defense, it must be acknowledged that picketing at the gates of a federal installation is proper, provided it does not constitute a secondary boycott or is not similarly unlawful.

### B. THE SECONDARY BOYCOTT AND USE OF RESERVED GATES

In an effort to achieve an equitable balance between the right of unions to picket and the right of neutral persons to remain uninvolved, the NLRB and the courts have established two somewhat related standards for determining when picketing constitutes a secondary boycott. The first concerns picketing at common situs work locations,<sup>136</sup> such as shopping centers or construction sites, and the second deals with picketing at work sites which are principally occupied by the primary employer, such as a large manufacturing plant. Parallel with the growth of these standards has been the development of the technique of reserving certain gates for secondary employers and their employees in order that they may continue working during a labor dispute. As will be seen, provided certain requirements are met, picketing at these reserved gates constitutes an unlawful secondary boycott and is subject to injunctive relief.

#### 1. *Common Situs Picketing.*

A labor dispute involving a single business in a large shopping center is a typical example of the problem created when picketing is conducted at a common situs. If the strikers are forbidden to picket at the shopping center, the strike is largely ineffectual. On the other hand if the picketing is unrestricted, many neutral employers, customers, and suppliers become enmeshed in the dispute in violation of the secondary boycott prohibition.

In *Sailor's Union of the Pacific*,<sup>137</sup> commonly referred to as

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<sup>135</sup>"See, e.g., *Geronimo Service Co.*, 129 N.L.R.B. 366 (1960).

<sup>136</sup>"See Local 761, *Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 676-77 (1961). Common situs work locations are those where two or more employers are performing separate and independent tasks on common premises.

<sup>137</sup>92 N.L.R.B. 547 (1950).

*Moore Dry Dock*, the NLRB announced the criteria by which these conflicting interests would be balanced. This case involved a dispute over organizational rights between the Sailor's Union and the owner of the ship *S.S. Phopho*. At the time of the dispute, the ship was tied up at Moore Dry Dock. When the Union began picketing at the dock, Moore's employees refused to cross the lines, leading to a charge that the Union was conducting a secondary boycott. The NLRB ruled that picketing at a secondary employer's premises, such as Moore's, would not be a secondary boycott if:

(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs*; (c) the picketing is limited to places reasonably close to the location of the *situs*; and (d) the picketing discloses clearly that the dispute is with the primary employer.<sup>138</sup>

[Italics in original ; footnotes omitted.]

Finding that these criteria were met, the NLRB concluded that the Union's picketing at the dock was lawful.

Subsequent to *Moore Dry Dock*, the question was raised whether these principles applied to circumstances where the primary employer was working on a common situs but also had a permanent place of business at a different location. The NLRB answered this question by adopting what has been called the fifth test of the *Moore Dry Dock* criteria. In addition to the four factors contained in *Moore Dry Dock*, the fact that the struck employer on a common situs has a permanent place of business elsewhere will be considered in determining whether the striking employees are conducting a secondary boycott by picketing at the common

These principles have been extended by the NLRB to cover not only situations where the picketing is at a secondary employer's premises, as in *Moore Dry Dock*, but also when the primary employer owns the common situs<sup>140</sup> or when the common situs is

<sup>138</sup> *Id.* at 549.

<sup>139</sup> See *Washington Coca Cola Bottling Works, Inc.*, 107 N.L.R.B. 299 (1953); *Plauche Elec. Inc.*, 135 N.L.R.B. 250 (1962).

<sup>140</sup> See *Retail Fruit & Vegetable Clerks, Local 1017*, 116 N.L.R.B. 866 (1956). The owner of a common market, who operated several of the numerous shops doing business in the market, was struck by his employees. When the strikers picketed the entrance to the entire market, a complaint was filed with the NLRB. In holding that this picketing constituted a secondary boycott, the NLRB ruled that the principles of *Moore Dry Dock*

owned by some third party.<sup>141</sup> The NLRB does not apply these standards mechanically but will look to the totality of a union's conduct for evidence which, despite literal compliance with the *Moore Dry Dock* criteria, discloses a real purpose to enmesh neutrals.<sup>142</sup> As a general rule, however, the union's object in picketing must be judged by the *Moore Dry Dock* criteria, unless direct evidence revealing a contrary object is available.<sup>143</sup>

As a result of the *Moore Dry Dock* criteria, the practice of reserving gates during a labor dispute for secondary employers and their employees has developed. Typical of this is the case of *Building & Constr. Trades Council*,<sup>144</sup> commonly referred to as *Markwell & Hartz*. Here, the primary employer, when faced with picketing at all entrances to the common situs by his employees, set aside one gate for his use and reserved all others for secondary employers. The union continued to picket the reserved gates and was charged with conducting a secondary boycott. The NLRB ruled that, by picketing at the reserved gates instead of picketing only at the gate the primary employer had set aside for his own use, the union had gone out of its way to enmesh neutral employers in the dispute. Because of this, the union was held to be picketing at a place not reasonably close to the situs of the dispute in violation of the third test of *Moore Dry Dock*.<sup>145</sup> As a

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should apply to all common situs situations without regard to the fact that the common situs was owned by the primary employer.

<sup>141</sup> See *Atomic Projects & Production Workers*, 120 N.L.R.B. 400 (1958). Where the common situs was owned by the government and neither the primary or secondary employers had an interest in the title to the common situs, the *Moore Dry Dock* criteria were held to apply.

<sup>142</sup> See, e.g., *Millwrights Local 1102*, 155 N.L.R.B. 1305 (1965). The NLRB has described the *Moore Dry Dock* criteria as an aid in determining the underlying question whether a secondary boycott is intended. Using this approach, the NLRB considers all the circumstances of the case and not just whether the *Moore Dry Dock* criteria are met. If the circumstances reveal a motive to involve neutrals, the union's activity will be held to be a secondary boycott.

<sup>143</sup> "The widest application of the *Moore Dry Dock* criteria has probably been in the trucking industry. This is due to the fact that employees on strike often picket at places of pick up and delivery. Compare *Schulz Ref. Serv., Inc.*, 87 N.L.R.B. 502 (1949), with *Sterling Beverages, Inc.*, 90 N.L.R.B. 401 (1950).

<sup>144</sup> 155 N.L.R.B. 319 (1965).

<sup>145</sup> "Violation of the third test of *Moore Dry Dock* (that the picketing be reasonably close to the situs of the dispute) has been interpreted by the NLRB to mean that a union in picketing a reserved gate went out of its way to reach neutral employees. Geographical distance, while important, is not the fundamental issue. See *id.* at 326-27.

result, the union was found to be engaged in secondary boycott activity and was ordered to cease and desist.

### *2. Premises Occupied Solely by the Primary Employer.*

As previously discussed, picketing at a primary employer's work site<sup>146</sup> with the object of disrupting his normal operations, to include influencing his employees, customers, and suppliers, is lawful primary picketing. Picketing becomes an unlawful secondary boycott only when its object is to put pressure on the primary employer by enmeshing secondary parties.<sup>147</sup> Based on this distinction, it would seem to follow that all picketing limited to premises solely occupied by the primary employer would be lawful, since only his employees, customers, and suppliers would be coming on the premises. This is exactly the position the NLRB took when first presented with this issue in *United Electrical Workers*,<sup>148</sup> commonly referred to as *Ryan*. In this case, Ryan had contracted to perform construction work on the primary employer's premises. At the time construction began, a separate gate was reserved for sole use of Ryan's employees. While Ryan was performing the contract, the primary employer became involved in a labor dispute with his employees which resulted in picketing at all gates to the premises, including the gate reserved for Ryan. When the union was charged with conducting a secondary boycott, the NLRB dismissed the charge, holding that picketing at the premises of a primary employer is not a secondary boycott even though the natural effect of the picketing was to dissuade all persons from entering the premises.<sup>149</sup> The result of this decision was to make picketing at any gate of the primary employer's premises lawful, regardless of whether one or more gates might be reserved for secondary employers.

It soon became apparent that the *Ryan* rule did not afford sufficient protection for neutral employers and their employees who came on solely occupied premises to perform work not directly

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<sup>146</sup> It is arguable that every work site is a common situs even though the premises are owned and used by a single employer. This is true because any number of other employers and their employees enter and engage in work on the premises by making deliveries, performing construction or repair work, etc. However, for purposes of discussing secondary boycotts and use of reserved gates, it is helpful to categorize such work sites as being "solely occupied" premises.

<sup>147</sup> "See *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

<sup>148</sup> 85 N.L.R.B. 417 (1949).

<sup>149</sup> See *id.* at 418.



related to the primary employer's operations. The first step in remedying this problem was the NLRB decision overruling the *Ryan* case to the extent that it implied that, merely because the primary employer owned the premises, any picketing would be lawful. The NLRB held that, regardless of ownership of the premises, unions must attempt to minimize the effect of picketing on the operations of neutral employers.<sup>150</sup>

This changed outlook by the NLRB revived the question of the legality of picketing at reserved gates on solely occupied premises. If common situs rules applied, as suggested by the NLRB, it would follow that picketing at gates reserved for neutrals would be illegal at either common situs or solely occupied premises, if the *Moore Dry Dock* criteria were not met.

The answer to this question was furnished by the Supreme Court in *Local 761, Int'l Union of Elec. Workers v. NLRB*,<sup>151</sup> commonly referred to as *General Electric*. This case concerned the General Electric plant located in Louisville, Kentucky. The work site was several acres in size and could be entered through five gates. One of these gates was reserved for the use of the large number of independent contractors performing a variety of tasks on the premises, such as maintenance, retooling, and construction. Because of a dispute over contract terms, the union representing the electricians working for General Electric picketed all gates to the premises, including the reserved gate. As a result, a charge was filed with the NLRB alleging that the union was conducting a secondary boycott.

Before the NLRB, the union argued that picketing at a primary employer's premises was inherently lawful. The NLRB, however, held that the circumstances of this case were similar to a common situs situation. Therefore, regardless of the locale of this dispute, the union was required to minimize the impact of picketing on secondary employers and their employees. Since this had not been done, the NLRB ruled the union was engaging in a secondary boycott.

The Supreme Court took a position somewhere between that of the union and the NLRB. Without clearly labeling the premises as "common situs" or as "solely occupied," the Court defined the issue as a question of whether the NLRB "may apply the *Dry*

<sup>150</sup>See *Retail Fruit & Vegetable Clerks, Local 1017*, 116 N.L.R.B. 856 (1956).

<sup>151</sup>366 U.S. 667 (1961).

*Dock* criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises." <sup>152</sup> In answering this question, the Court considered the key to be the nature of the work being performed by the employees using the reserved gate. From this premise, the Court concluded that picketing at a reserved gate would be lawful unless (1) the employer has marked and set apart the reserved gate from other gates, and (2) the work done by the men who use the reserved gate is unrelated to the normal operations of the employer (the work, to be unrelated, must be of a kind which, if done while the plant was engaged in regular operations, would not necessitate curtailing those operations).<sup>153</sup> Because the record indicated that the reserved gate was used by contractors whose work appeared related to General Electric's normal operations, the case was remanded for determination whether use of the gate by those contractors was *de minimus*.<sup>154</sup>

The "related work" test for determining the legality of picketing at reserved gates on solely occupied premises has been used in at least one case by the Supreme Court since the *General Electric* decision. In *United Steelworkers v. NLRB*,<sup>155</sup> commonly referred to as *Carrier Corp.*, the union picketed all gates to the primary employer's premises, including a reserved gate used solely by employers who were neutral but were performing delivery and car switching activities directly related to the normal operations of the primary employer. Applying the *General Electric* "related work" test, the Court held the picketing to be lawful and not a secondary boycott.

### 3. Present Controversy over Use of Reserved Gates and a Suggested Solution.

Understandably, unions have fought hard against the use of

<sup>152</sup> *Id.* at 680.

<sup>153</sup> *Id.* at 681.

<sup>154</sup> *Id.* at 682. On remand, the NLRB found that the secondary employers had performed maintenance of a type frequently done by G. E. employees (installation of shower rooms, repair of roads, enlarging the ventilating system, etc.) and that secondary employers worked on the construction of a truck dock which was part of G. E.'s normal operations. For these reasons, the work done by the secondary employers failed to meet the "related work" test and picketing at the reserved gate was legal. Local 761, Int'l Union of Elec. Workers, 138 N.L.R.B. 342 (1962).

<sup>155</sup> 376 U.S. 492 (1964).

reserved gates and continue to resist their use whenever possible. At the present time, the greatest conflict is in the construction industry. Labor's position is that all contractors on a construction site are engaged in a joint venture, even though technically they are separate firms. Because of this community of interest, it should, therefore, be lawful to picket a construction site, to include picketing at reserved gates, with the object of influencing all contractors working on the site. The Supreme Court rejected this argument in *NLRB v. Denver Building & Construction Trades Council*,<sup>156</sup> in which contractors on a construction site were held to be independent and neutral employers working on a common situs and, as such, entitled to protection from secondary boycott activity.

Labor was quick to see the *General Electric* "related work" test as a means of reversing *Denver* and raised this question in the *Markwell & Hartz* case.<sup>157</sup> There, the primary employer, a general contractor on a construction project, became involved in a labor dispute over wage levels. When the union picketed the entire construction site, the primary employer set aside a single gate for his employees and suppliers and reserved all remaining gates for uninvolved subcontractors. When the union continued picketing at the reserved gates, a secondary boycott charge was filed with the NLRB.

The union argued that *General Electric* was a sub silentio reversal of *Denver*. It based this conclusion on the theory that all work at a construction site is related work, as defined in *General Electric*. As a result, the union contended the contractors using reserved gates at the *Markwell & Hartx* construction site were performing work related to the primary employer's operations and, therefore, picketing at these gates was lawful.

The NLRB refused to accept this argument and took the view that *Denver* still governed construction site cases. Accordingly, the NLRB treated the construction site as a common situs and measured the legality of picketing by the *Moore Dry Dock* criteria without regard to the "related work" test. Using this approach, the NLRB found that the union, in going out of its way to enmesh neutrals by picketing at a place not reasonably close to the situs of the dispute, was conducting a secondary boycott.

The question whether the "related work" test and the *Moore*

<sup>156</sup> 341 U.S. 675 (1951).

<sup>157</sup> Building & Constr. Trades Council, 155 N.L.R.B. 319 (1965)

*Dry Dock* criteria both apply to common situs cases remains to be answered by the courts, and at this point it is difficult to predict the probable outcome. Although the NLRB in *Markwell & Hartx* has taken the position that the tests are distinct and thereby continued the necessity for labeling premises as "common situs" or "solely occupied," it is arguable that this approach is incorrect. It should be recognized that all work sites are to some degree a common situs and, therefore, the *Moore Dry Dock* criteria will be useful in every case in determining the object of picketing. The "related work" test, on the other hand, is valuable in determining whether the secondary employers using reserved gates are truly neutral or, in fact, contributing to the primary employer's basic operation. Using these tests in tandem would furnish a single meaningful standard for balancing the interest of strikers and neutrals and would at the same time simplify a complicated legal issue.

The real question in the construction industry is not one of which test to apply. Rather, it is a question of defining what constitutes related and unrelated work. Until *Denver* is reversed, for purposes of the LMRA the law must consider contractors on a construction site as performing unrelated work. As such, the related work test in *General Electric* will not provide the relief sought by labor, and the NLRB need not have continued the distinction between common situs and solely occupied premises in deciding *Markwell & Hartx*.

In addition to contesting the common situs status of construction sites before the NLRB and in the courts, efforts have been made to reverse *Denver* through legislative action. The most recent attempt was H.R. 10027 in the 89th Congress. This bill passed the House but was not considered by the Senate prior to adjournment.<sup>158</sup> As a consequence it will be necessary for a new bill to be proposed in the 90th Congress, if legislation on this issue is to be enacted. This is deemed likely.<sup>159</sup>

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<sup>158</sup> H.R. 10027, 89th Cong., 2d Sess. (1966) ; see generally Note, *Common Situs Picketing and the Construction Industry*, 54 GEO. L.J. 962, 976 (1966).

<sup>159</sup> "Of interest is that portion of the bill which pertains to the military: "[P]rovided that in the case of any such site which is located at any military facility or installation of the Army, Navy, or Air Force, or which is located at a facility or installation of any other department or agency of the Government if a major purpose of such facility or installation is, or will be, the development, production, testing, firing, or launching of munitions, weapons, missiles, or space vehicles, prior written notice of intent to strike or refuse to perform services, of not less than ten days shall be given by the

*C. USE OF RESERVED GATES ON  
MILITARY INSTALLATIONS*

*1. Background.*

Prior to correlating the principles governing the use of reserved gates in commercial situations to those involving military installations, it is important to note some basic distinctions in the setting of the problem.

Great emphasis has been put on secondary boycott activity throughout this article, with only passing comment on other unfair labor practices. This has been done because picketing at a military post is particularly susceptible to becoming a secondary boycott. On commercial work sites, persons become involved in a labor dispute only when they have some direct connection with the primary employer either as a supplier, customer, etc., or by working on a relatively small work site with him. However, on military posts—which often consist of fifty or more square miles—there are usually a number of contractors on post at any given time working on separate projects in different locations. Should any one of these contractors be struck and the post gates picketed, neutral contractors would be enmeshed in the dispute even though they might have been totally unaware of the struck contractor's presence on the installation prior to the picketing. These circumstances are probably unique, since few commercial enterprises cover such large areas of land and have such a disparity of activity going on at any one time. As a result, picketing at a military post will normally enmesh numerous other government contractors whose neutrality is apparent. Should a union picket at a reserved gate, it would be equally apparent that it was engaging in a

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labor organization involved to the Federal Mediation and Conciliation Service, to any State or territorial agency established to mediate and conciliate disputes within the State or territory where such site is located, to the several employers who are jointly engaged at such site, to the Army, Navy, or Air Force or other department or agency of the Government concerned with the particular facility or installation, and to any national or international labor organization of which the labor organization involved is an affiliate. The notice requirements of the preceding proviso are in addition to, and not in lieu of the notice requirements prescribed by section 8(d) of the Act." H.R. 10027, 89th Cong., 2d Sess., 2-3 (1966).

As was pointed out by the minority view in the House report, this provision affords almost no new protection for military installations. A strike is almost always preceded by a long period of negotiation, at which time everything which could be hoped to be achieved by mediation has been accomplished. As a result, the proposed bill would give real help only in the rare event of a wildcat strike.

secondary boycott. Commercial situations are seldom, if ever, this clear cut.

Another distinction is the difference between the status of federal agencies and commercial firms under the LMRA. There is no question that the LMRA applies to commercial firms and their employees. A federal agency, however, is neither an "employer" nor "employee," as defined by the LMRA, and therefore must claim protection from secondary boycotts and other unfair labor practices as a "person." That a federal agency is a protected "person" has been established in both court and NLRB decisions.<sup>160</sup>

A final difference is that a military post is both an instrument of national defense and a community, not simply a work site. When a union pickets a commercial work site, the result may be damaging to the struck employer's business and may delay the progress of work, but it normally does not endanger the national defense effort.

### 2. Use of Reserved Gates by Military Authorities.

A single case is reported which involved the use of a reserved gate at a military post by order of the post commander. In *Atomic Projects & Production Workers*,<sup>161</sup> Sandia Corporation was engaged in work on Sandia Base pursuant to a contract with the Atomic Energy Commission (AEC). As a result of a labor dispute, the Corporation was struck. Prior to the walkout, the president of the union notified the base commander of the pending strike. The base commander advised him that he planned to open a special gate for neutral contractors working on the base, but he could obtain no commitment from the union that this gate would not be picketed along with the others. Consistent with this plan, the base commander had a separate gate opened and marked as reserved for independent contractors working under contracts with the AEC and the U.S. Army Corps of Engineers. The provost marshal issued instructions to military guards posted at the reserved gate to permit use of the gate only by suppliers and contractors connected with Sandia Base activities. Notwithstanding these procedures, the union picketed the reserved gate as well as all other gates to the base.<sup>162</sup> When employees of the

<sup>160</sup>@See notes 71-81 *supra* and accompanying text.

<sup>161</sup> 120 N.L.R.B. 400 (1958).

<sup>162</sup> The union avoided the problem of cutting off subsistence supplies for the

neutral contractors refused to cross the pickets at the reserved gate, a charge that the union was conducting a secondary boycott was filed with the NLRB.

In reaching a decision, the NLRB first ruled that it had jurisdiction on the basis of the standards applicable to government contractors and that the AEC and U.S. Army Corps of Engineers were "persons" protected by the LMRA from unfair labor practices. Turning to the facts of the case, the NLRB determined that the base was a common situs and that the legality of picketing at the reserved gate should, therefore, be measured by the *Moore Dry Dock* criteria. Using this approach, the NLRB found that the effect of the picketing at the reserved gate was to enmesh neutral employers for the purpose of bringing pressure on the AEC and the U.S. Army Corps of Engineers, in hopes that they would in turn bring pressure to bear on the corporation to settle on the union's terms. For this reason, the picketing was considered not to be reasonably close to the situs of the dispute and was, therefore, an unlawful secondary boycott.<sup>163</sup>

### 3. *Inzplementation of a Reserved Gate Plan at a Military Installation.*

Perhaps the best approach to discussing the implementation of a reserved gate<sup>164</sup> plan at a military post is to consider a hypo-

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base by removing the pickets whenever trucks with supplies arrived at the gates.

<sup>163</sup> In view of this decision which treated a military installation as a common situs and the NLRB's decision in *Markwell & Hartz* that the "related work" test does not apply to common situs cases, it can be argued that the "related work" test is a superfluous factor in determining the legality of picketing at military installations. However, this is not believed to be a correct conclusion, first of all, because the issue of the applicability of the "related work" test to common situs cases remains to be finally answered; and second, because the "related work" test is a valuable tool for post commanders to use in determining which contractors working on a post may use reserved gates and which must use picketed gates.

<sup>164</sup> The case decisions have used the term "reserved gate" to refer to both the gates used by neutrals (where picketing is illegal) and the gates used by the primary employer (where picketing is legal). For purposes of clarity, "reserved gate" will be used in this discussion to refer to the gates reserved for neutral employers. The gates used by the primary employer will be indicated by referring to them as "set aside." Additionally, it is noteworthy that legal authorities in the military frequently refer to use of "reserved gate" plans as "one gate" plans. As will be pointed out in subsequent discussion, any number of gates may be reserved for neutrals or set aside for those involved in the dispute, depending on the circumstances of the

thetical situation. Assume that a contract has been awarded for construction of new barracks at Fort Blank. The fort is rectangular in shape and consists of approximately 100 square miles enclosed by a security fence which has four gates, one for each side of the fort. The construction site is near the north gate and is not convenient to the south, east, or west gates. In performing the contract, the government contractor has several subcontractors working on the site with him. When the project is approximately one-half completed, one of the subcontractors is struck by his employees because of an alleged unfair labor practice. The striking employees immediately picket all four gates to the installation, bringing construction of the barracks to a halt as well as stopping work on several unrelated projects being performed by neutral contractors.

The first consideration of the installation commander in determining how and where to establish reserved gates is one of policy. He may take the conservative approach that all that is desired is to isolate the dispute involving the barracks project, without regard to further separation of the struck subcontractor from neutral subcontractors working on the same construction site. This would concede that all work on the barracks would cease and have, as the primary goal, resumption of work on all other contracts being performed on the fort. To accomplish this, a gate or gates should be set aside for all persons working on the barracks, regardless of whether they are directly involved in the labor dispute or are neutrals, and the remaining gates should be marked as reserved for all other contractors. Implementation of this plan would be relatively simple and would make any picketing at reserved gates ipso facto a secondary boycott. Furthermore, this approach would avoid the present conflict over the status of contractors working on a construction site.

If the installation commander desires to use the reserved gate concept to its fullest extent, based on the *Denver* decision it would be legally correct to go one step further and treat the uninvolved subcontractors on the barracks project as neutrals.<sup>165</sup> This approach would entail setting aside a gate for the struck contractor, his employees, and suppliers and reserving all other gates for neutral contractors, both those working on unrelated projects

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particular dispute. For this reason, the label "one gate" plan is considered misleading and is not used.

<sup>165</sup> See note 156 *supra* and accompanying text.



and those working on the barracks. This carries greater risk that reserved gates will be picketed in spite of their status but, if honored, would permit work on the barracks project to continue. If the reserved gates are picketed, and provided the *Denver*<sup>166</sup> rule remains unchanged, the union action would constitute a secondary boycott and injunctive relief would be available.

After deciding what is intended to be accomplished by utilizing reserved gates, it is necessary to consider when the gates may be designated as such. The hypothetical situation presents this question in terms of whether the reserved gates may be established after picketing has already begun. In a broader context, it is also necessary to consider whether reserved gates may be established prior to the existence of a labor dispute.

The case decisions indicate that there is almost no restriction on when a reserved gate may be established. In *General Electric*,<sup>167</sup> the reserved gate for independent contractors was established several years prior to the time the reserved gate was picketed. In *Atomic Projects & Production Workers*,<sup>168</sup> the base commander reserved a gate for neutrals at the same time the union began picketing. Finally, in *Markwell & Hartz*,<sup>169</sup> it was only after picketing had begun that the gates were reserved for neutral contractors. As a result, all an installation commander need be concerned with is the benefit a reserved gate will provide his installation when it is picketed. If picketing is a frequent occurrence, it would be advisable to reserve gates as a matter of course for contractors working on post. On the other hand, a commander is free to wait for picketing to begin before putting into effect a reserved gate plan.

The next consideration is the location and number of gates which may be reserved. Since a military post is a common situs, the decision which gates to reserve must be made consistent with the *Moore Dry Dock* criteria which requires, *inter alia*, that picketing at a common situs to be lawful must be reasonably close to the situs of the dispute."<sup>170</sup> However, no restriction is put on the number of gates to be set aside for the disputants or of those reserved for neutrals. Thus, in *Atomic Projects & Production*

<sup>166</sup> NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

<sup>167</sup> Local 761, Int'l Union of Elec. Workers v. NLRB, 366 U.S. 667 (1961).

<sup>168</sup> 120 N.L.R.B. 400 (1958).

<sup>169</sup> Building & Constr. Trades Council, 155 N.L.R.B. 319 (1965).

<sup>170</sup> 92 N.L.R.B. at 549.

*Workers*, one gate was reserved for neutrals and all remaining gates were subject to lawful picketing; while in *Markwell & Hartz*, only one gate was set aside for the disputants and all other gates were reserved for neutrals. As can be seen, the installation commander has a wide range of alternatives, and for this reason care should be taken to avoid setting aside gates for the disputants which would unfairly restrict the union's right to picket. Thus, it would be improper to set aside a gate which is remote from the work site<sup>171</sup> or to set aside a single gate for use of the disputants when large numbers of people normally using several gates are involved. Although the final determination of the manner in which the installation gates will be utilized necessarily turns on the facts of each particular case, there will be few instances in which setting aside a single gate closest to the work site would not give a union adequate opportunity to protest its disagreement with the struck employer. For this reason, it is suggested that a fair arrangement in the hypothetical situation would be to set aside the north gate for the disputants and reserve all remaining gates for neutrals.

Once the gates to be reserved are decided upon and clearly marked, the major remaining concern is to assure that appropriate instructions are given to the guards at the reserved gates and that they adhere rigidly to these instructions. Instructions need consist only of a clear description of which persons are to be permitted to use the reserved gates and the admonition to permit no exceptions. Failure to enforce these instructions will likely result in mingled use of the gate by both neutrals and persons involved in the labor dispute. If this occurs and is more than de minimus, the gate will no longer be considered reserved and picketing will be lawful.<sup>172</sup>

## 4. *Picketing at a Reserved Gate.*

If a union pickets a properly established and operated reserved gate, it will be subject to the charge of conducting a secondary boycott.<sup>173</sup> Relief is normally obtained by filing a charge with the regional office of the NLRB closest to the site of the labor

<sup>171</sup> See note 145 *supra*.

<sup>172</sup> Cf. Local 761, *Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667, 682 (1961).

<sup>173</sup> See Local 761, *Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961); *Atomic Projects & Production Workers*, 120 N.L.R.B. 400 (1958); *Building & Constr. Trades Council*, 155 N.L.R.B. 319 (1965).

dispute.<sup>174</sup> Under NLRB procedures, charges of secondary boycott activity are given priority in consideration and, if the charge appears well-founded, the regional attorney will petition the closest U.S. district court for an injunction pending a final decision.<sup>175</sup>

Once a military installation is subjected to a secondary boycott, the critical question becomes who will file the charge with the NLRB—one of the involved contractors or the federal agency? Any of the involved contractors have standing to file a charge with the NLRB and, from the federal agency's viewpoint, this is the preferable method of obtaining relief. Otherwise, the federal agency will be faced with the problem of having to step aside from its required neutral position and file a charge in its own right.<sup>176</sup> At the present time, ASPR gives no guidance and makes no provision for such a situation, presumably because of a reluctance to put into the form of official regulations methods for federal agencies to seek injunctive relief from union activity. In spite of this important political consideration and the validity of the overall policy of neutrality of federal agencies in labor disputes, there is no reason why a military installation should submit to a secondary boycott. Nevertheless, until guidance is forthcoming, the authorities on a military post can take no direct action to obtain relief from a secondary boycott but must seek the advice and direction of higher authority.'''

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<sup>174</sup> NLRB RULES § 102.10.

<sup>175</sup> See LMRA § 10(1), 61 Stat. 149 (1947), *as amended*, 73 Stat. 544 (1959), 29 U.S.C. § 160(1) (1964).

<sup>176</sup> ASPR § 12-101.1(e) (Rev. No. 9, 29 Jan. 1965).

''Both the ASPR and the APP provisions concerning the action a contracting officer is to take during a labor dispute are highly unsatisfactory. Neither set of regulations spells out with clarity the affirmative action a contracting officer may take, and each appears to be deliberately vague in order to assure that all action taken concerning the dispute is coordinated with higher authority. As salutary as the desire for a coordinated Department of the Army policy concerning labor disputes is, it does not justify the lack of detailed guidance given to the field. Furthermore, much of what is contained in ASPR is confusing, if not contradictory. In one instance the contracting officer is admonished to remain neutral, yet at the same time required to encourage the contractor to resort to the NLRB to resolve the dispute. When it is considered that this would require the contractor to file with the NLRB a charge that the union is committing an unfair labor practice, it can hardly be said that the contracting officer has maintained a neutral position. Compare ASPR § 12-101.1(e) (Rev. No. 9, 29 Jan. 1965) with ASPR § 12-101.2(c) (Rev. No. 9, 29 Jan. 1965). In view of these circumstances, the contracting officer and his legal advisors appear to have no choice but to seek advice from higher authority in every labor dispute. For guidance concerning labor disputes involving the Department of the Army, it is

## 5. Other Aspects of Picketing.

Related to the issue of compliance with a reserved gate plan is the question of an installation commander's authority to control picketing as an incident of command. Since this concerns legal considerations other than those involving the interrelation of labor law and government procurement, a detailed examination of this question is beyond the scope of this article. However, the following is for the purpose of providing a general statement of the law on this point.

Picketing conducted off the installation, even though immediately outside the gates, is beyond the jurisdiction of an installation commander. Even if the picketing becomes violent, the installation commander may not take unilateral action but must rely on local authorities to control the strikers. This situation becomes even more critical when picketing endangers military personnel and government property. Nonetheless, the better approach is believed to be for military authorities to rely solely on local police to protect the government's interest.<sup>178</sup>

Nothing has been found which specifically denies unions the right to picket on an installation, and presumably an installation commander could, in his discretion, permit the strikers to picket at the work site.<sup>179</sup> It is somewhat clearer, however, that an installation commander has authority to deny entrance upon an installation, provided this authority is not exercised in an arbitrary manner.<sup>180</sup> It is doubted that refusal to grant entrance in

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necessary to consult the Labor Advisor, Office of the Assistant Secretary of the Army. See APP §§ 12-050, 12-101.1(a), and 12-101.3 (Change No. 2, 25 March 1966).

<sup>178</sup> For a complete discussion of an installation commander's duty and authority to protect government property, see Peck, *The Use of Force To Protect Government Property*, 26 MIL. L. REV. 81 (1964); see also Furman, *Restrictions upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85 (1960); see generally U.S. DEP'T OF ARMY, PAMPHLET NO. 27-164, MILITARY RESERVATIONS 84 (1965).

<sup>179</sup> But see APP § 12-101.60 (Change No. 2, 25 March 1966), which provides that labor representatives are not authorized to engage on post in matters not directly related to the contract between the government and the contractor. In *Atomic Projects & Production Workers*, 120 N.L.R.B. 400 (1958), mention was made of a request by the union to picket on post during a labor dispute prior to the one in issue. It was noted that at that time the Department of Defense had been consulted and had denied the request as a matter of policy. It is believed that this policy is still in effect, although there is no formal authority available to support this conclusion.

<sup>180</sup> See U.S. DEP'T OF ARMY, PAMPHLET NO. 27-164, MILITARY RESERVATIONS 75 (1965). In excluding individuals from a military reservation, the com-

order to prevent picketing on an installation would be considered an arbitrary exercise of discretion. Should the strikers picket at the work site without first obtaining permission to do so, the installation commander could properly remove strikers from the installation, but nothing more.<sup>181</sup>

### V. CONCLUSION

Experience has demonstrated that the effect of a labor dispute on award and termination of government contracts is not too dissimilar from any other factor that bears on a contractor's responsibility or which might constitute a basis for excusable delay. In either instance, a factual determination is required which then only necessitates a common sense application of the contract provisions and governing regulations. The critical difference is the problem created when the circumstances involve the contracting officer in judging the merits of a labor dispute rather than merely making a finding of fact. This raises the question of the qualifications of contracting officers to evaluate adequately a labor dispute, as well as the desirability of using government procurement to implement the LMRA. At the present time, a contracting officer is not required to evaluate a contractor's labor practices in making award of a contract, but he must do so when deciding whether delay in performance because of a strike is excusable.

Picketing at a federal installation may be conducted by a union, provided that it is done in a manner not conflicting with the LMRA or other applicable law. Should the picketing amount to a secondary boycott or otherwise be illegal, the federal agency involved—as a “person” protected by the LMRA—has standing to seek relief from the NLRB. When faced with the problem of picketing at an installation, the commander or executive head of the installation may use a “reserved gate” plan to mitigate the impact of picketing on installation activities. This plan permits

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mandating officer must act on a reasonable basis. An arbitrary discrimination between civilians would constitute a breach of discretion on his part. Thus, he might exclude all civilians from the installation, but not all except one against whom no charge of wrongdoing existed.

<sup>181</sup> This conclusion is based on 18 U.S.C. § 1382 (1964), which makes it an offense to reenter a post after having been removed. It has been reasoned that this impliedly authorizes an installation commander to use force in removing persons from the installation. See Peck, *The Use of Force To Protect Government Property*, 26 MIL. L. REV. 81, 87 (1964).

isolation of the government contractor experiencing the labor dispute by requiring him and his employees to use only certain gates to the installation. All remaining gates are reserved for persons not involved in the dispute and are not subject to lawful picketing.

A reserved gate plan offers a federal agency a legal means of assuring that a labor dispute does not interfere with its normal operations. At the same time, it does not deny employees their right to disrupt an offending employer's business by lawful primary picketing. This results in a fair balance of the opposing interest of striking employees and the public and does not require the federal agency to step aside from a neutral position. It is, therefore, recommended that commanders, judge advocates, and contracting officers be prepared for potentially damaging strikes by formulating "reserved gate" plans which will fit the circumstances of their operations and the installations on which they are located.

## COMMENT

### BLOOD TESTS FOR PATERNITY CLAIMS: ARE ARMY PROCEDURES ADEQUATE?\*

#### I. INTRODUCTION

It has been said of rape that "it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."<sup>1</sup> This characterization is applicable equally to paternity claims, particularly where the alleged father concedes having had sexual relations with the claimant mother. The problem is of particular interest to the military, as the serviceman is often the target of a paternity claim, probably due to his relatively young age, often unmarried or unaccompanied status, and necessary peregrinations. Undoubtedly a certain number of military members are falsely accused, for they are not really the true fathers of the children in question.

Fortunately, medical science has made considerable progress in recent years in the use of blood tests to study the father-mother-child genetic relationship. The results of these tests often may be helpful in resolving the issue of parenthood. This comment will discuss the various systems of blood testing which may be useful in paternity cases, including the evidentiary value and treatment of the results in the courts. Finally—and, perhaps, more importantly here—there will be an examination of the current Army attitude toward paternity claims, as reflected in the Army Regulations, to determine whether Army procedures are adequate to avail the serviceman of the possible benefits of these scientific advances.

#### II. MEDICAL DEVELOPMENTS IN PATERNITY BLOOD TESTING

The A-B-O blood group was discovered in **1901**. In the following years other factors were identified in the blood cells and blood

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\*The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

<sup>1</sup> **1 M. HALE, PLEAS OF THE CROWN 635, 636 (1620).**

serum, until now there are twelve different systems, each of which has actual or potential use in medico-legal matters. All of the systems follow the laws of genetics in relationship to their inheritance by the child from the parents, and thus all are applicable to paternity problems. The following table shows the twelve blood group systems, the typing reagents used in each system, and the probability that each system will exclude a person falsely accused of parenthood.

Table 1. Blood Groups of Medico-Legal Application

<u>System</u>	<u>Typing Reagents Used</u>	<u>Chance of Paternity Exclusion</u>
1. A-B-O -----	Anti A, B -----	17%
2. M-N-S -----	Anti M, N, S -----	27%
3. Rh -----	Anti Rh <sub>o</sub> (D), rh'(c), rh''(E), hr'(e) -----	25%
4. P -----	Anti P -----	3%
5. Lewis -----	Anti Le <sup>a</sup> , Le <sup>b</sup> -----	5%
6. Kell -----	Anti K, k -----	4%
7. Duffy -----	Anti Fy <sup>a</sup> , Fy <sup>b</sup> -----	19%
8. Kidd -----	Anti Jk <sup>a</sup> , Jk <sup>b</sup> -----	19%
9. Lutheran -----	Anti Lu <sup>a</sup> -----	3%
10. Xg <sup>a</sup> -----	Anti Xg <sup>a</sup> -----	?
11. Haptoglobins -----	Anti Hp <sup>1</sup> , Hp <sup>2</sup> -----	18%
12. Gc -----	Anti Gc <sup>1</sup> , Gc <sup>2</sup> -----	15%
Combined -----	-----	80+ %

A. POSSIBLE BLOOD GROUPS AND TYPES

1. A-B-O System.

All human bloods fall into one of four groups: O, A, B, or AB. To gain this characteristic, every person has inherited a pair of genes, one gene of each pair coming from the father and the other coming from the mother. It follows that the blood factors A or B cannot appear in the blood of a child unless they are present in the blood of one or both parents. Conversely, a parent with blood of group AB cannot have a child with blood of group O, and a parent of group O cannot have a child of group AB.

With reference to A-B-O blood groups, ten different kinds of matings are possible. The blood groups that can occur among the children from each of these matings are shown in Table 2.

Table 2. Blood Groups A-B-O in Parents and Children<sup>\*</sup>

<u>Blood Groups of Parents</u>	<u>Blood Groups Possible in Children</u>	<u>Blood Groups Not Possible in Children</u>
1. O and O -----	O -----	A, B, AB -----
2. O and A -----	O, A -----	B, AB -----

<sup>\*</sup>C. STETLER & A. MORITZ, DOCTOR AND PATIENT AND THE LAW 276 (1962).



3. A and A	O, A	B, AB
4. O and B	O, B	A, AB
5. B and B	O, B	A, AB
6. A and B	O, A, B, AB	None
7. O and AB	A, B	O, AB
8. A and AB	A, B, AB	O
9. B and AB	A, B, AB	O
10. AB and AB	A, B, AB	O

The A blood group can be further analyzed to distinguish variants, the most useful of which are subtypes A<sub>1</sub> and A<sub>2</sub>, which are occasionally used in medico-legal work. By using them, the investigator is able to identify blood groups A<sub>1</sub>, A<sub>2</sub>, A<sub>1</sub>B, A<sub>2</sub>B, in addition to the standard B and O, making six major groups identifiable in this system.

### 2. M-N-S System.

Human blood also falls into these three types: M, N, and MN. In this system, six different kinds of matings are possible, leading to the children shown in Table 3.

Table 3. Blood Groups M-N in Parents and Children<sup>a</sup>

<u>Blood Groups of Parents</u>	<u>Blood Groups Possible in Children</u>	<u>Blood Groups Not Possible in Children</u>
1. M and M	M	N, MN
2. N and N	N	M, MN
3. M and N	MN	M, N
4. MN and M	M, MN	N
5. MN and N	N, MN	M
6. MN and MN	M, N, MN	None

Two other blood factors are included in this system: S and s. Antiserums used to test for these factors are scarcer than M and N antiserums, but in selected cases their application for paternity studies can be just as valid.

### 3. Rh System.

Another set of blood types, discovered in 1940 and referred to as Rh blood types, is most important because sensitization to them was found to be the most common cause of hemolytic disease of the newborn. Their mechanism of inheritance is the same as for the A-B-O and M-N-S systems, but the situation is complicated by the greater variety of blood factors and also by the fact that there is a controversy among immunohematologists as to their correct nomenclature.

<sup>a</sup> *Id.* at 277.

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For practical purposes, the genetic rules as to this system are: (1) blood factors Rh<sub>0</sub>(D), rh'(C), rh''(E), hr'(c), and hr''(e) cannot appear in the blood of a child unless they are present in the blood of one or both parents; (2) a parent who is rh'(C) negative cannot have a hr'(c) negative child; and (3) a parent who is rh''(E) negative cannot have an hr''(e) negative child.

With seven commonly available antisera, 28 sharply defined Rh types can be differentiated. In practice, the number of types encountered will be smaller, because there are only nine types with an incidence of 1 percent or higher in the general population.<sup>4</sup>

### 4. *P, Lewis, Kell, Duffy, Kidd, and Lutheran Systems.*

These systems all contain distinct blood factors, each resulting in two or three identifiable blood types in tested individuals. The antisera available for use with these systems are often scarce, or have peculiar temperature requirements, or need Coombs' serum as a catalyst for the reaction. Consequently, their use in medico-legal work has been limited, although in selected cases the results could be considered valid.<sup>5</sup>

### 5. *Xg<sup>a</sup> System.*

The gene for this blood factor has been discovered to be transmitted on the sex chromosome, and the blood factor has been detected in 65 percent of the male population. Still relatively new, its use in medico-legal work is not evaluated yet.<sup>6</sup>

### 6. *Serum (Haptoglobin and Gc) Systems.*

Because of the discovery of the above blood systems in the red blood cell, investigation of genetic serum characteristics receded into the background. Haptoglobins are a type of plasma protein, discovered in serum in 1939 but not effectively studied in regard to hereditary factors until the development of starch electrophoresis in 1955. There are two serum factors—Hp<sup>1</sup> and Hp<sup>2</sup>—leading to three possible types (with incidence of occurrence in the population in parentheses): Hp<sup>1</sup>-Hp<sup>1</sup> (16%), Hp<sup>1</sup>-Hp<sup>2</sup> (48%), and Hp<sup>2</sup>-Hp<sup>2</sup> (36%). These factors have been used in paternity cases

<sup>4</sup> American Medical Association Committee on Medicolegal Problems, *Medical Application of Blood-Grouping Tests*, 164 J.A.M.A. 2036-44 (1957).

<sup>5</sup> Allen, Jones & Diamond, *Medicolegal Application of Blood Grouping*, 251 NEW ENG. J. MED. 146-47 (1954).

<sup>6</sup> Chown, Lewis & Kaita, *The Xg Blood Group System — Data on 294 White Families, Mainly Canadian*, 6 CAN. J. GENET. CYTOL. 431-34 (1964).

in England and Denmark.'

Another system of inherited serum proteins is coming into use in paternity studies in Sweden. These Gc groups (group-specific components) are independent of haptoglobins but show the same pattern of inheritance, giving three types: Gc 1-1, Gc 2-2, and Gc 2-1. In tests of paternity, 15 percent of wrongly accused men are exonerated by the Gc groups.<sup>8</sup>

## B. VALUE OF BLOOD TESTS IN PATERNITY CLAIMS

### 1. *Exclusion of Paternity.*

The summary of the twelve blood systems in Table 1 represents all those tests of potential medico-legal value. There are very few laboratories that have the antiserums or professional competence to do them all. Most investigations are limited to two antiserums in the A-B-O system, three antiserums in the M-N-S system, and four antiserums in the Rh system. Thus, in the A-B-O system, it is usually said that 17 percent of falsely accused men could be excluded; with the M-N-S system, 27 percent of falsely accused men could be excluded; and with the Rh system, 25 percent of falsely accused men could be excluded. The chance of exoneration by use of all three systems is not exactly their sum, because of the possibility of exclusion by more than one system. Thus, the chance of exoneration with the three commonly used systems is approximately 55 percent.<sup>9</sup>

Tests with antiserums of the other red cell systems and serum systems, although they do not have the medico-legal acceptance that the A-B-O, M-N-S, and Rh tests have, can still provide valuable evidence. In time, most of these serums will be commercially available and will have the requisite genetic family studies published, so that they will be generally acceptable in courts. If all the blood systems of potential medico-legal value listed in Table 1 could be utilized, the chance of exclusion of paternity when the man is falsely accused would be over 80 percent.

### 2. *Circumstantial Evidence Favoring Paternity.*

The expert in the field of blood grouping is accustomed to

<sup>7</sup> Editorial, *Haptoglobins in Evidence*, 1 BRIT. MED. J. 561-62 (1966).

<sup>8</sup> *New Paternity Test Harnesses a Protein*, 82 SCI. NEWS LETTER 256 (20 Oct. 1962).

<sup>9</sup> American Medical Association Committee on Medicolegal Problems, *supra* note 4.

thinking of blood tests as a method of establishing nonparentage only. When the blood types of the child match genetically with those of the suspected parents, this is considered an inconclusive finding because of the possibility of coincidence. With the increase in the number of blood systems, however, the possibility suggests itself of using blood tests as circumstantial evidence of paternity.

For example, if the suspected father belongs to type  $rh''(E)$ , the mother to type  $hr''(e)$ , and the child to type  $rh''(E)$ , the immunologist should call this unusual circumstance to the attention of the court. Since  $rh''(E)$  occurs in less than 0.5 percent of the population, the concomitant presence of this type in the child and the accused man is circumstantial evidence of paternity, assuming it is ascertained that a brother of the accused, of the same type, cannot be involved. Such an observation should not be included in the official report, but should be mentioned and explained in a covering letter accompanying the report.

It is likely that new blood systems will be discovered in the future, and each new discovery increases the chance that a falsely accused man can be exonerated by blood tests. If the ability to disprove paternity ever approaches 100 percent, virtual proof of paternity in a case in which the man is actually the father may be possible.

### III. LEGAL DEVELOPMENTS IN COURTROOM USE OF BLOOD TESTS

The problem of disputed parentage has long been one of the most difficult to come before the courts. An unwed mother could name some man as the father of her child. That man might never have seen her before; or if he had known her, he might have been only one of several to have had sexual relations with her. Regardless, juries were usually swayed by sympathy toward the mother. The man was generally assumed to be guilty, for he had no way to prove his innocence.

Blood tests have given the falsely accused man a possibility of scientifically proving his innocence. It was in 1935, in New York, that Assemblyman Charles H. Breitbart and immunohematologist Alexander Wiener secured passage of the first state law permitting blood tests to be accepted as evidence in paternity cases.<sup>20</sup> A-B-O and M-N tests were quickly used with success. Rh blood

<sup>20</sup> Robinson, *Blood Will Tell*, 53 READER'S DIGEST 68-70 (Sept. 1948).

types were delineated in the 1940's and were first used in court in 1947, when Dr. Wiener testified that the child of a 16-year-old girl had not been fathered by the 20-year-old man who had married her on that supposition, the Rh factors excluding his possible paternity.]'

In Scandinavia and Germany, blood tests have been employed more extensively, being used routinely in all paternity proceedings; the tests are carried out in government laboratories.<sup>12</sup>

The most controversial trial illustrating the prescientific approach to paternity proceedings was the Berry-Chaplin case in 1944 and 1945.<sup>13</sup> The whole episode should have been avoided, because there was a pretrial agreement between the attorneys for blood tests on the parties involved. It had been arranged that blood tests would be performed by a group of three physicians when the then-unborn baby was four months old; if two of the three physicians felt that the tests ruled out Chaplin's role as father, the suit would be dropped.<sup>14</sup> In February 1944, the blood tests were made, showing Chaplin to be group O, Joan Berry group A, and the baby group B. The B factor in the baby did not derive from the mother, nor could Chaplin have contributed it; the father of the child was someone else. By California law at that time, however, such evidence was not conclusive since the statute did not say it was; it was decided that such evidence should be weighed by a jury.<sup>15</sup> The first trial ended in a deadlock; in regard to the blood tests, the foreman of the jury said that the blood test evidence got the jurors "balled up," so it was disregarded.<sup>16</sup> At the second trial, Chaplain was found guilty, with the blood test evidence again being slighted, one juror being quoted as saying, "He had no evidence to prove that he was not the father of the child."<sup>17</sup> Chaplin was ordered to pay \$75 a week for the support of the child until she was 21 years old, nearly \$82,000.<sup>18</sup>

<sup>11</sup> *Saks v. Saks*, 189 Misc. 667, 71 N.Y.S.2d 797 (1947); see also *Paternity and Rh*, NEWSWEEK, 4 Aug. 1947, at 60.

<sup>12</sup> C. Stetler & A. Moritz, *supra* note 2.

<sup>13</sup> *Berry v. Chaplin*, 74 Cal. App.2d 652, 169 P.2d 442 (1946).

<sup>14</sup> *Chaplin and Joan*, NEWSWEEK, 21 June 1943, at 49.

<sup>15</sup> 74 Cal. App.2d at 665, 169 P.2d at 451; see also N.Y. Times, 9 March 1944, at 19, col. 4.

<sup>16</sup> *Chaplin Case Ends in Mistrial Ruling*, N.Y. Times, 5 Jan. 1945, at 16, col. 3.

<sup>17</sup> *Chaplin Declared Father of Child*, N.Y. Times, 18 April 1945, at 25, col. 4.

<sup>18</sup> *Worth \$3,000,000, Chaplin Must Pay*, N.Y. Times, 17 July 1945, at 15, col. 4.

### A. ADMISSIBILITY OF BLOOD TESTS IN EVIDENCE

It is now generally held, usually by statute, that in cases in which the paternity of a child is in question, blood-grouping tests establishing nonpaternity are admissible.<sup>19</sup>

In New York, for example, in the case of *Clark v. Ryshedorph*,<sup>20</sup> the court recognized that evidence excluding defendant's paternity was admissible under a statute providing that whenever a blood-grouping test is ordered, the results shall be receivable in evidence only if definite exclusion is established.

On the other hand, courts usually hold that blood-grouping results are inadmissible on the question of paternity if the tests fail to establish nonpaternity.<sup>21</sup> In Michigan, for example, in the case of *People v. Nichols*,<sup>22</sup> it was held that the admission in a bastardy case of testimony concerning results of blood tests that did not establish defendant's nonpaternity constituted reversible error. It was pointed out that "[a]ll the scientific evidence in this case and in the cited cases is in accord that the results of blood tests may rule out but can never establish paternity," with the result that the controversial testimony "had not the slightest probative value."<sup>23</sup> The court commented, "The possible psychological effect on the minds of the jurors cannot be ignored. The use of scientific apparatus and tests and expert testimony as to scientific results, . . . [to which the jury might accord such weight as they wished], could not have failed to mislead the jury into believing that this totally irrelevant evidence could be considered as having probative value."<sup>24</sup>

### B. WEIGHT OF BLOOD TESTS AS EVIDENCE

Assuming that the blood tests are admissible, questions arise regarding the weight to be given them as evidence. Under the laws of genetics, tests indicating that the alleged father could not have been the father of the child in question are, according to scientific opinion, conclusive on this issue. The courts have been faced with the problem of whether a jury finding inconsistent with

<sup>19</sup> See I WIGMORE, EVIDENCE § 165a n.2 (3d ed. 1940, supp. 1964); Annot., 46 A.L.R.2d 1000, § 10 (1956).

<sup>20</sup> 281 App. Div. 121, 118 N.Y.S.2d 103 (1952).

<sup>21</sup> See J. RICHARDSON, MODERN SCIENTIFIC EVIDENCE § 12.11 n.31 (1961); I WIGMORE, EVIDENCE § 165a (3d ed. 1940).

<sup>22</sup> 341 Mich. 311, 67 N.W.2d 230 (1954).

<sup>23</sup> *Id.* at 331, 67 N.W.2d at 232.

<sup>24</sup> *Id.*

the test results should be overturned. Generally, the courts hold that blood tests establishing nonpaternity are conclusive on the issue, unless the jury is presented with a defect in the testing methods employed in a particular case.<sup>25</sup>

In Maine, for example, in the case of *Jordan v. Mace*,<sup>26</sup> the jury found the defendant to be the father of twins. Pursuant to orders of the court, blood specimens had been taken which revealed the mother to be type M, the alleged father to be type N, and the children to be types M and MN. A qualified expert testified that the defendant could not be the father of the twins, because a parent of blood type N cannot have a child of blood type M, as in the case of the first twin. And since twins must have the same father, this man could not be the father of the other twin. The appellate court ruled that the jury finding in favor of paternity was unsupported by the evidence. Testimony by physicians with regard to the manner in which the blood tests were performed—from the taking of the blood, through repeated tests, to the making of the reports—indicated that great care had been taken at all steps. The possibility of error was minimized by running the blood tests eleven times, each test producing the same result. The court's comment was: "What further safeguards could reasonably have been taken to protect the integrity of the tests? If the jury may disregard the fact of non-paternity shown here so clearly by men trained and skilled in science, the purpose and intent of the Legislature, that the light of science be brought to bear upon a case such as this, are given no practical effect."<sup>27</sup>

On the other hand, a Vermont court<sup>28</sup> would not overturn a jury finding that the defendant was the father of the child, despite blood tests that indicated nonpaternity. It noted that the technician who took the blood samples was not called as a witness, and her failure to testify was not explained. In addition, although the expert in charge of the tests stated that his assistant was instructed to stay with the blood at all times, there was no evidence that she did so. Because of these gaps, it was not definitely established that the blood samples tested were from the parties and the baby, with the result that it was for the jury to determine whether the tests were properly made. "Under all the circum-

<sup>25</sup> See Annot., 46 A.L.R.2d 1000, §§ 13-15 (1956).

<sup>26</sup> 144 Me. 351, 69 A.2d 670 (1949).

<sup>27</sup> *Id.* at 354, 69 A.2d at 672.

<sup>28</sup> *Pomainville v. Bicknell*, 118 Vt. 328, 109 A.2d 342 (1954)

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stances . . . , we cannot say that the jury were manifestly wrong in rejecting the expert's testimony as to the accuracy of the blood tests that were made."<sup>29</sup>

### IV. ARMY ATTITUDE ON PATERNITY CLAIMS

#### A. AR 608-99, *PATERNITY CLAIMS*

Army Regulation **608-99** (2 February 1967), Paternity Claims, was issued to provide guidance in this field. Upon receipt of an allegation of paternity against a serviceman, his commanding officer will interview him regarding his intentions in the matter. He will be asked whether he admits or denies paternity.

If the serviceman admits paternity, he will be asked whether he is willing to marry the mother or whether he will furnish financial support. If he is willing to marry the woman, he can be granted ordinary leave for this purpose. If he does not wish to marry the woman but is willing to furnish financial support, he will be allowed to initiate an allotment to the mother. If the serviceman admits paternity but is unwilling either to marry the woman or to support her, the claimant will be advised that her only recourse is to the courts.

If the serviceman denies paternity, the commanding officer will so advise the woman, and suggest that her only recourse is to initiate proceedings in the civilian courts.

If there exists a court decree of paternity or support, given by either a United States or a foreign court, the commander will advise the serviceman of his moral and legal obligations in the matter. The serviceman is expected to provide the support prescribed by the court and will be admonished to take care of the matter so that it will not again come to the attention of his military superiors.

#### B. *USE OF COURT-MARTIAL IN ENFORCEMENT OF PATERNITY CLAIMS* •

Although court-martial cannot of course be substituted for civil-court prosecution of a paternity claim, either (1) dishonorable failure to pay the civil-court judgment,<sup>30</sup> or (2) the adultery<sup>31</sup>

<sup>29</sup> *Id.* at 331; 109 A.2d 343.

<sup>30</sup> UNIFORM CODE OF MILITARY JUSTICE arts. 133, 134. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 127c.

<sup>31</sup> *Id.*



or fornication<sup>32</sup> involved, would be offenses punishable under the *Uniform Code of Military Justice*. In either instance, favorable paternity blood tests would seem to be excellent and admissible evidence.

### V. SERVICE EXPERIENCE WITH PATERNITY BLOOD TESTS

#### A. *FACILITIES AVAILABLE*

There are three laboratories under Army control that do blood testing for use in paternity matters: (a) Blood Transfusion Research Division, U.S. Army Medical Research Laboratory, Fort Knox, Kentucky; (b) First U.S. Army Medical Laboratory #2, New York, New York; and (c) 406th Medical Laboratory, Camp Zama, Japan.

The Fort Knox laboratory is responsible for standardizing blood serums throughout the Army. The immunologist there has been doing paternity blood tests for installations throughout the world. With a reference battery of anti-serums, including many rare ones, he is able to test for **23 blood factors**.<sup>33</sup>

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#### <sup>32</sup> *Id.*

<sup>33</sup> Lieutenant Colonel Camp, currently the Fort Knox laboratory immunologist, suggests the following directions for obtaining these tests:

(a) Blood should be collected by a Medical Officer who personally verifies and identifies individuals concerned, collecting specimens of blood from all individuals in separate tamper-proof 13 x 100 mm test tubes to which the individual's name is affixed and to which the Medical Officer applies his signature as part of the tamper-proof seal.

(b) Further identification is desirable in the form of fingerprints placed on a form to accompany blood samples. Continuity of handling, packaging, and mailing (by certified mail) is a responsibility of the Pathology Service of the local military hospital.

(c) Package should be mailed to Director, Blood Transfusion Research Division, **U.S.** Army Medical Research Laboratory, Fort Knox, Kentucky **40121**.

(d) Opening and documentation of contents is the responsibility of the Director, Blood Transfusion Research Division, who will have officer and laboratory personnel witness and acknowledge specimens and condition of tamper-proof tubes by signature.

(e) Custodial continuity of specimens will be maintained by the Director, Blood Transfusion Research Division, during complete testing period. All tests will be conducted by the Director, Blood Transfusion Research Division, and additional blind tests will be conducted by personnel of the Blood Transfusion Research Division Forensic Laboratory.

(f) Reports will be made to responsible authorities by the Director, Blood Transfusion Research Division.

B. REPRESENTATIVE CASES<sup>34</sup>

Case #1. In 1964, an aide-de-camp had had sexual relations with a Korean woman in the early part of his 13-month tour, but the friendship had not continued. Twelve months later—just before he was to rotate back to the United States—the woman reappeared with a three-month-old baby and a suit for support brought in a Korean court.

Blood samples were obtained from the woman and child and from the alleged father and sent to the 406th Medical Laboratory. The tests showed:

	A-B-O	M-N	rh'(C)	Rh <sub>0</sub> (D)	rh''(E)	hr'(c)	hr''(e)
Korean woman --	AB	M	-	+	+	+	+
Alleged father ---	B	N	-	-	-	+	+
Baby girl -----	B	N	+	-	-	+	+

The results indicate that the child could not be from this postulated union. Neither the woman nor the alleged father possessed the Rh antigen rh'(C), which was found in the child. This antigen was rechecked with five different antisera and was found to be absent in both the woman and the proposed father; the baby was positive with all five antisera.

The M-N results are interesting in that the woman is pure M, while the baby is pure N. It is not possible for her to have been the mother of the child, for an M parent cannot bear an N child.<sup>35</sup> When the results were shown to the woman's attorney, the case was dropped. It was apparent that she had borrowed someone else's baby for the purpose of this false paternity charge in order to obtain money from the American.

Case #2. In searching for the father of her child, a New Jersey woman apparently named several men, for the Juvenile and Domestic Relations Court judge requested blood tests on both a

<sup>34</sup> These cases were processed by Captain S. Collins, Chief, Immunology Department, 406th Medical Laboratory, Camp Zama, Japan.

<sup>35</sup> Caution must be exercised that one of the parents does not harbor the rare M<sup>s</sup> antigen, which cannot be detected with the usual test; anti-Gilfeather (anti M<sup>s</sup>) serum must be used to identify it. See Allen, Corcoran, Kenton & Breare, *M<sup>s</sup>, A New Blood Group Antigen in the MNS System*, 3 *Vox Sanguinis* 81-91 (1958).

## BLOOD TESTS

New Jersey civilian and a serviceman based in Japan. The results were :

	A-B-O	M-N	rh' (C)	Rh <sub>0</sub> (D)	rh'' (E)	hr' (c)	hr'' (e)
Mother -----	O	MN	+	+	-	+	+
New Jersey man -	A,	N	+	+	-	+	+
Serviceman -----	O	N	+	+	-	-	+
Baby boy -----	O	MN	+	+	-	-	+

The results indicate that a child of the groups and types indicated could be the result of a combination from the groups and types of the mother and either man. Neither man can be excluded as a possible father.

Blood tests that fail to establish nonpaternity, as in this case, are generally inadmissible in disputed paternity proceedings. If the tests are taken into consideration at all, the equal ability of either man to be the father would certainly dilute the plaintiff's case against either of the men separately.

## VI. EXTENT OF PROBLEM IN THE ARMY

No statistics are available to indicate the extent of the military paternity problem. It is not considered a medical matter, so it is not included in medical reports. It has not been the subject of judge advocate appeal proceedings, for no cases involving paternity have been reported by the Court of Military Appeals. Conversations with currently practicing military attorneys have failed to show many cases; each attorney knew of only a few cases at most, although it was believed that the incidence was highest at training camps. Legal assistance reporting forms lump "paternity" with "domestic relations," so review of these gives no clue. Allotments to illegitimate children would reveal only a small proportion of the cases. Individual company and battalion commanders can usually recall only one or two cases. The only figures ever published were by a *Life* magazine reporter after World War II, who stated that American soldiers had fathered **22,000** illegitimate children in England, 30,000-50,000 in Germany, 1,000-4,000 in Japan, and 2,000-4,000 in the **Philippines**.<sup>38</sup> His

<sup>38</sup> *The Babies They Left Behind Them*, LIFE, 23 Aug. 1948, at 41.

source of information was not given. Regardless, this would not necessarily reflect itself in paternity claims.

In the civilian world, paternity cases have increased in recent years. Generally, only 10 percent of accused men deny paternity and request blood tests to support their denial. Acquittals are obtained in approximately half of these cases. Blood tests account for 25 percent of these acquittals.<sup>37</sup>

Another aspect of the problem was studied by Sussman and Schatkin in 1957.<sup>38</sup> Persons who were involved in litigation relating to paternity were invited to submit to blood-grouping tests after the cases had been settled by the defendant's admission of paternity. Of 500 couples interviewed, 67 couples agreed to cooperate, and the bloods were tested by A-B-O, M-N, and Rh systems. The results indicated that of the 67 men involved in these cases of uncontested paternity action, six were absolutely excluded as the father of the involved child. As mentioned before, blood tests using the A-B-O, M-N, and Rh systems can exclude only half the falsely accused men. It follows, then, that probably 12 (18%) of the accused men who admitted paternity were not the fathers of the children they accepted as their own.

### VII. CONCLUSION

When a man is falsely accused of paternity, he has a 50 percent chance of being exonerated by the combined use of the common A-B-O, M-N, and Rh blood tests. In certain situations in which rare antiserum availability and laboratory competence are optimal, the chance of exclusion against a false claim of paternity may be over 80 percent. Occasionally, rare combinations of blood types in the suspected father and child may provide strong circumstantial evidence that paternity is indeed likely.

Blood tests should be mandatory in all matters relating to paternity. They should be required prior to trial or even prior to institution of paternity proceedings. The tremendous deterrent effect produced by the requirement that the parties submit to blood tests capable of exposing a false charge of paternity would prevent many of these suits from being instituted. In addition, extortion as a result of fear of the notoriety of a public trial, as

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<sup>37</sup> Sussman, *Blood-Grouping Tests—A Review of 1000 Cases of Disputed Paternity*, 40 AM. J. CLIN. PATH. 38-42 (1963).

<sup>38</sup> Sussman & Schatkin, *Blood-Grouping Tests in Undisputed Paternity Proceedings*, 164 J.A.M.A. 249-50 (1957).

well as admissions made because of ignorance of the biologic facts that distinguish intercourse from paternity, would be prevented.

Most states now have laws that permit admission of blood tests in suits involving paternity claims, and courts in most of these states now hold the tests to be conclusive—the jury is not allowed to go contrary to them. As the only means of attack on a blood test would be on the method of performing the test, it becomes of prime importance that the testing be done with unimpeachable accuracy and by expert immunologists.

In the Army, there are three medical laboratories with special competence and adequate antisera available to perform blood tests to aid in establishing nonpaternity. The Blood Transfusion Research Division of the **U.S.** Army Medical Research Laboratory at Fort Knox is especially equipped in this line; it has an immunologist with long experience with these tests, and it maintains an extensive bank of antisera. In fact, its mission includes the offering of advanced blood-factor testing for use in paternity matters.

The current Army Regulation 608–99, Paternity Claims, suggests handling paternity claims at the unit level. The accused is given certain options, as discussed previously, but no legal advice or scientific aids are specifically mentioned in the regulation as being available to the accused soldier, though the former is often sought and given.

It would appear that AR 608–99 should be revised to avail the serviceman of the benefits of blood-testing procedures before he is asked to make a decision regarding admission of paternity. Since the individual serviceman is unlikely to be familiar with blood-testing procedures when such an allegation is made, he should automatically be provided legal counsel to advise him on the availability of Army laboratory facilities that can do these tests which may, if he is indeed not the father, have a **50 + %** chance of disproving the alleged fatherhood at the **start**.<sup>39</sup>

FRANK W. KIEL\*

<sup>39</sup> Certain questions, beyond the scope of this comment, may become pertinent in a particular paternity case: How can blood samples be obtained if the claimant mother does not voluntarily submit to the tests? Will the courts so order on motion of the alleged father? Also, would such a motion constitute an appearance to confer jurisdiction? See generally Annot., 46 A.L.R.2d 1000 (1956).

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By Order of the Secretary of the Army:

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